91-1864

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

F. JOSEPH LOEPER, FRANK T. BUDZYDLOWSKI, CLARENCE THOMPSON, DANIEL A. TORISKY, LEROY GREEN, and SALLY MEMINGER,
Petitioners,

v.

PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT COMMISSION, OR ITS SUCCESSOR,
Respondent

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Final Legislative Reapportionment Plan dilutes the minority vote in certain districts in violation of the Fourteenth Amendment to the United States Constitution and the Voting Rights Act of 1965, as amended.

2. Whether the Final Legislative Reapportionment Plan violates the staggered term requirement mandated by the Pennsylvania Constitution.

3. Whether the Respondent unlawfully gerrymandered districts on the basis of voter registration figures instead of decennial census data in violation of the Fourteenth Amendment to the United States Constitution and Article II, § 17 of the Pennsylvania Constitution.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Pennsylvania Supreme Court upholding the constitutionality of the Final Plan of the Pennsylvania Legislative Reapportionment Commission was issued on May 1, 1992 (App. A, pp. 1a-28a).

The Order of the Pennsylvania Supreme Court denying all Petitions for Review was issued on February 14, 1992 (App. B, pp. 29a-30a).

JURISDICTION

The Opinion of the Pennsylvania Supreme Court was issued on May 1, 1992, and the Order of the Pennsylvania Supreme Court denying all Petitions for Review was

issued on February 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the First Amendment to the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Article I, §§ 20, Article II, §§ 3, 16, 17, of the Constitution of the Commonwealth of Pennsylvania, and 42 U.S.C. § 1973, known as the Voting Rights Act of 1965. These provisions are set forth verbatim in Appendix K, pp. 53a-58a.

STATEMENT OF THE CASE

Respondent Pennsylvania Legislative Reapportionment Commission (the "Commission") is a body constituted in accordance with Article II, Section 17 of the Pennsylvania Constitution for the purpose of reapportioning the Commonwealth into districts to be used thereafter in elections to the General Assembly.

The Commission is composed of four members of the General Assembly, one each from the majority and minority caucuses in each house and a fifth member who is not a legislator as chairman. In 1991, the Commission deadlocked on the selection of a chairman. As a result of the deadlock the Pennsylvania Supreme Court appointed the chairman pursuant to Art. II, § 17 of the Pennsylvania Constitution.

On September 25, 1991, a majority of the Commission adopted the Preliminary Legislative Reapportionment Plan. Petitioner Loeper, who is the Majority Leader of the Pennsylvania Senate and a member of the Commission, expressed his objections to the Preliminary Legislative Reapportionment Plan, which appear in the official record of the Commission.

On October 9, 1991, a public hearing on the Preliminary Reapportionment Plan was held at which Petitioner Loeper reiterated his previous objections.

On November 15, 1991, during the Commission's final public meeting on the Preliminary Reapportionment Plan, petitioner Loeper reiterated his previous objections, declared additional objections, offered several amendments which were rejected by a bare majority of the members of the Commission and voted against the Final Reapportionment Plan (the "Plan"). The Plan was approved 3-2 by the Commission with both the Senate majority and minority leaders in the opposition.

As provided by Article II, Section 17 of the Pennsylvania Constitution, Petitioners filed a Petition for Review in the Pennsylvania Supreme Court challenging the Plan on December 16, 1991, and an amended Petition for Review on January 23, 1992. (App. C, pp. 31a-37a.)

The Pennsylvania Supreme Court heard oral argument on January 25, 1992. On February 14, 1992, the Pennsylvania Supreme Court entered an Order (App. B, pp. 29a-30a), that the Plan was not contrary to law and denied the appeals. On May 1, 1992, the Pennsylvania Supreme Court delivered its Opinion. (App. A, pp. 1a-28a.)

The Commission devised a reapportionment plan which denies the minority African-American population in Allegheny County the ability to nominate and elect a candidate of their choice. The Commission made absolutely no effort to create a winnable minority district in Allegheny County, but was able to create winnable minority districts in Philadelphia. The Commission Chairman Robert J. Cindrich, Esquire, exhibited no interest in significantly enhancing minority participation in elections in Allegheny County.

Moreover, the goal of Chairman Cindrich was to maintain the status quo by ensuring continuation of the balance (26 Republicans, 24 Democrats) in the Senate between the political parties. Under the Chairman's leadership, the Commission's Plan completely dismissed the opportunity to devise a winnable minority seat in the 38th Senatorial District in Allegheny County. (App. D,

pp. 38a.) The Commission had before it other alternatives which created a winnable minority district, one of which was offered by Petitioner Loeper (App. E, p. 39a.)

The Chairman based the Commission's new Allegheny County Plan on party registration totals, rather than population totals. At a public hearing on the Commission's Preliminary Plan, Commission Chairman Cindrich stated:

> Now, as to a couple of other points about demographics. When you look at the shift in the loss in population in the Allegheny County area, what we find is that it had little or no effect on the registration of people there, the party registration. So that while the Republican argument was that the Democrats should lose two seats, in fact, 10 years ago the registration was roughly 70 percent Democrat, 30 percent Republican. Ten years later, the same area looking at it from a jet up high, still 70 percent Democrat, 30 percent Republican. I was hard pressed to determine why that should mean the loss of an incumbent seat for the Democrats. . . . If we had gone the other way we would have the rather anomalous situation of the Allegheny County region having a 70-30 voter registration edge and having a 50-50 party split in terms of the representation in the Senate of Pennsylvania. It didn't seem to the Chairman to be the appropriate thing to do.

(App. G, pp. 41a-42a.)

Historically, Allegheny County Democrats have struggled to maintain a powerbase of seven Senate seats. Between 1970 and 1980, the Allegheny County/City of Pittsburgh area lost substantial population—enough to displace a Senate seat from Allegheny County.

In order to maintain seven senators from Allegheny County, the minority leader was able to stretch Senatorial districts 40 and 45 into adjoining counties. To maximize the strength of the Allegheny County portion of the districts, both seats became three county districts. The Al-

legheny County Democrat incumbent in the 40th district was defeated by a Democrat from Westmoreland County in the 1986 primary. In 1990, an Allegheny candidate defeated the Westmoreland incumbent, and returned control of all seven Senate districts to Allegheny County residents.

Senate district 38 was the seat with the greatest minority population in western Pennsylvania. Of the 208,587 residents, (1990 population figures within the old Senate districts) 67,463 or 32.34% are African-American, while 66.47% of 138,651 are white. This district was substantially a City of Pittsburgh seat until 1981, when it was stretched ot the North Hills suburban area in order to dilute the African-American vote. This seat was stretched further into the North Hills suburbs in the current Plan.

Petitioner Leoper proposed increasing the minority population in the 38th district from 32.34% to 45%. The Commission rejected the proposal by a 3-2 vote. A plan offered by Charles Kindle, an African-American resident of Penn Hills, at the October 9, 1991, public hearing increased the minority population to 51% in the 38th and was not adopted by the Commission (the "Kindle Plan"). (App. H, pp. 43a-45a.)

Since the Pennsylvania Constitution of 1790, the Senate has had staggered terms in order to provide for continuity and stability in representation. Odd-numbered Senate districts will have elections in 1992 and even-numbered districts will follow in 1994.

The Commission's Plan ran roughshod over the Pennsylvania Constitution's staggered term scheme by unnecessarily merging the old 43rd and 44th districts in Allegheny County, once again using voter registration as its basis for the merger rather than decennial census data.

The Commission assigned the resulting new district the number 43, causing the elimination of a Senate seat (the

44th) which was not scheduled for election until 1994, and unconstitutionally disrupted the staggered term scheme mandated by the Pennsylvania Constitution.

Due to an increase in the population in southeastern Pennsylvania, The Plan created a new district in southeastern Pennsylvania. The Commission determined that it would assign the new district the number 44. Even-numbered Senate districts are not scheduled for election until 1994.

The new 44th Senatorial District is not scheduled for an election until 1994, effectively leaving its electors with no representation unless a special election is called by the Democratic Lieutenant Governor, or the incumbent Republican, Senator Pecora, who lives in the old 44th District (three hundred miles away) is permitted to serve out his term as their representative in the Senate. Petitioner Loeper's plan, on the other hand, merged the 43rd into the 42nd and 45th districts, obviating the need for a special election, and offering a way to create a winnable minority district in the 38th.

Petitioner Loeper also separately proposed re-numbering the districts in the Plan so as to return the mid-term 44th District to its Allegheny County base and shift the 43rd district which is scheduled for election in 1992 to a new district in southeastern Pennsylvania. That proposal was rejected on two separate occasions by the Commission by 3-2 votes.

REASONS FOR GRANTING THE WRIT

I. THE COMMISSION'S LEGISLATIVE REAPPORTIONMENT PLAN DENIES PETITIONERS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND § 2 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED.

The Commission's Plan divided the minority community of interest which follows the natural geography of the Ohio, Monongahela and Allegheny Rivers. The districts created by the Commission's Plan contained super-white majorities, or bloc voting majorities of white voters.

The Commission deliberately cracked Allegheny County's minority population, scattering it among Senate Districts 38, 42, 43 and 45, rendering the minority vote inconsequential and depriving minority voters of their ability to nominate or elect a candidate of their choice in any of the new districts.

Moreover, other states, in order to draw winnable minority districts have been required to draw incredibly complex districts.

The 38th district plan proffered by the Petitioner was not difficult in design, maintains a community of interest, is geographically compact and continguous and will provide the minority voters an opportunity to nominate and elect a candidate of their choice. Petitioner's plan would have created a winnable minority seat in the 38th Senatorial District which would have increased the minority population and therefore voting strength from 32% to 45%.

The Petitioner's 38th district is politically cohesive due to shared community of interest, as well as past minority voting patterns. While the creation of this district does not *guarantee* the minority population that it can nominate and elect a minority candidate, it gives the minority

an opportunity significantly better than that which existed prior to the 1992 reapportionment and an opportunity far superior to that offered by the Commission's Plan.

The Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws to all citizens. In the case of reapportionment, it guarantees that each individual's vote possesses the same value as another—one person, one vote. Actions which dilute voting strength of a group of electors, regardless of race, trigger the equal protection of the Fourteenth Amendment and the provisions of § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973; *Davis v. Bandemer*, 478 U.S. 109, 123 (1986); *Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom, East Carroll Parish v. Marshall*, 424 U.S. 636 (1976).

II. THE COMMISSION'S PLAN HAS BREACHED THE PUBLIC TRUST AND DILUTED THE VOTE OF THE MINORITY POPULATION.

This Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), explained the importance of full and effective participation in the electoral process by all voters:

> State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full

> and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. *Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.* Modern and viable state government needs, and the Constitution demands, no less.

Id. at 564-65 (emphasis added).

In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), this Court found that in order to succeed, plaintiffs had the burden to show that the electoral practice at issue had been adopted with the intent to discriminate against the protected class. *Id.* at 73. Thereafter in 1982, the Congress amended subsection 2(a) of the Voting Rights Act to change the test for discrimination from "intent" to one of "results". It now reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection 9(b).

42 U.S.C. § 1973(a).

Thus the stage was set for *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the 1990 reapportionment season. Originally a history of discrimination was used as a means of factually establishing intent. *E.g., White v. Regester*, 412 U.S. 755 (1973). However, Congress, in codifying that requirement when it amended § 2, reduced it to one of a number of elements of proof regardless of the actual intent of a plan's drafters.

The amendments basically reduced the requirement to prove a discriminatory "intent" and substituted a "re-

sults" or the "totality of the circumstances" test as proof of discrimination. The plaintiff must prove three factors in order to mount a successful claim of a § 2 violation: geographic compactness, political cohesiveness and the existence of a white majority voting bloc which consistently defeats a minority candidate. This Court in *White* noted:

> Stated succinctly, a bloc [sometimes referred to as a racial polarization] voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. (citation omitted) These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. (footnote omitted) If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect it candidates. (footnote and citations omitted). Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. (citation omitted) Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, (citation omitted), usually to defeat the minority's preferred candidate.

Id., at 48-53 (emphasis added).

None of the Plan's districts in Allegheny County have provided minority voters with a viable opportunity to effectively participate in the electoral process. Whites and African-Americans in the City of Pittsburgh and environs vote in racial blocs.

The district court, in *East Jefferson Coalition v. Jefferson Parish*, 691 F. Supp. 991 (E.D. La. 1988), concluded that a "proposed district is sufficiently compact if it retains a *natural sense of community*." *Id.* at 1007 (emphasis added). In *Dillard v. Baldwin County Board of Education*, 686 F. Supp. 1459 (M.D. Ala. 1988), the court made it clear that it would not reject a reapportionment plan which included an elongated district which it was alleged did not meet the definition of "compactness" set forth in *Gingles*:

> By compactness, [*Gingles*] does not mean that a proposed district must meet, or attempt to meet, some aesthetic absolute, such as symmetry or attractiveness. An aesthetic norm, by itself, would be not only unrelated to the legal and social issues presented under Section 2, it would be an unworkable concept, resulting in arbitrary and capricious results, because it offers no guidance as to when it is met. It is apparent from the [*Gingles*] opinion that compactness is a relative term tied to certain practical objectives under § 2, the requirement is not that a district be compact, but that it be "sufficiently" compact under § 2.

Id. at 1466-67.

The Commission's Plan not only deprives the rights of minorities, but also was drawn to protect a Democratic Senate seat. Denial of opportunity for minorities is occasioned by many factors including incumbent protection. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, —— U.S. —— (1991). In that case the Court found that division of the hispanic community was the chosen means by which the Supervisors preserved their own constituencies. "The Supervisors intended to create the very discriminatory result that occurred. That intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful." *Id.* at 771 (citations omitted).

Are redistricting entities required to maximize minority participation? If not, surely they are, at the very least,

charged with a constitutional obligation not to *minimize* those opportunities within the totality of their statewide plan.

The Fourteenth Amendment to the Constitution of the United States, the Voting Rights Act of 1965 and numerous judicial decisions have made plain that it is not constitutional for any plan of reapportionment of any legislative body to dilute or debase the vote of any voter or group of voters. State legislatures are the foundation of representative government and it is essential that reapportionment of those bodies be accomplished in a manner consistent with the Fourteenth Amendment.

In the Pittsburgh area the minority concentration is sufficient to create a winnable minority seat. There is adequate evidence to satisfy the requirements of the Voting Rights Act and the "*Gingles* Test". It is no longer necessary to prove discriminatory intent.

III. THE STAGGERED TERM REQUIREMENT IN PENNSYLVANIA IS CONSTITUTIONALLY MANDATED AND MAY NOT BE ALTERED BY THE COMMISSION SINCE THE COMMISSION WAS SPECIFICALLY GIVEN NEITHER THE POWER TO ALTER THE STAGGERED TERM SCHEME NOR TO ORDER AN ELECTION WHICH WOULD BE REQUIRED BY CREATING A NEW DISTRICT AND ASSIGNING TO IT AN EVEN NUMBER.

The Pennsylvania Constitution has always provided staggered terms for Senators. This provision is indicative of the desire to provide for continuity and "institutional memory" in one house of the General Assembly. Until the present Commission, there had been no attempt to meddle with the staggered term requirement.

Now in an effort to effect a sophisticated political gerrymander, the Commission seeks to unseat a Senator (Frank Pecora) who was elected four times as a Republican in a heavily Democrat district by changing the number of his

district (44th) and "moving" the 44th east as the "new" seat. This creates two separate problems, both of which raise federal and state constitutional issues.

Apparently, the Commission's desired effect was to appear to acknowledge the population shifts by creating a new seat in the east which according to the Commission Chairman "will probably be Republican" and to counter that potential gain by unseating a Republican incumbent in the west.

The first problem is the unseating of the Republican Senator because the Commission lacks the authority to create the situation in which it is necessary to require an election in an even numbered seat.

Secondly, the Commission has created a new district which could be without elected representation of its own in the Senate for two years since arguably there is no sitting Senator in that district nor any guarantee that an election will be called to fill the seat since the Commission lacks authority to call an election and there is no guarantee the lieutenant governor will do so.[1]

Thus the Commission has exceeded its authority under Article II, § 17, of the Pennsylvania Constitution and interfered with the system of representative government as contemplated by both the federal and state constitutions. The Commission has exceeded the authority delegated to it by the Pennsylvania Constitution in disturbing that scheme by assigning an even number to the "new" seat created by its plan thereby denying equal protection of the laws to the electors of that district.

The Commission has been granted no such power by the Pennsylvania Constitutional provision which established

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[1] Had the drafters of the controlling constitutional provisions intended for the Commission to create such situations, it would have provided the Commission with power to remedy the situation by empowering it to order elections when required by its reapportionment plan.

it. Nor did the Pennsylvania Constitution grant to the Commission the power to call elections which power would be necessary if the drafters had intended the Commission to operate outside of the staggered term plan. The Commission, in creating a district in which it cannot require an election, has left that matter to the courts, the legislature or the lieutenant governor.

It is violative of both the United States and Pennsylvania Constitutions for the Commission to leave the citizens of the "new" 44th district without an election in 1992, effectively leaving them without the ability to seek redress of grievances through a senator of their choosing afforded by the First Amendment to the United States Constitution. This outcome is unnecessary and was devised solely for the purpose of facilitating a surreptitious political gerrymander in Allegheny County.

A simple solution is to "move" to the southeastern part of Pennsylvania the 43rd senate district in which an election will be held in 1992 in the ordinary course.

From the creation of the Pennsylvania Senate by the Constitution of 1790, that body has had constitutionally-mandated staggered terms. That Constitution provided that after the first Senate was selected, members would draw by lot one, two, three, and four year terms "so that one-fourth may be chosen every year". Pa. Const. art. I, § 9 (1790). (App. I, p. 46a.) Even though an essentially new Constitution was adopted in 1838, which revised terms for members of the Senate, the Constitutional Convention judged it to be essential that legislators be permitted to complete the terms to which they had been elected, notwithstanding the complications in implementing the new three year term. The new Constitution of 1873 also provided for Senators then sitting to ". . . represent the Districts in which they reside until the end of the terms for which they were elected." Pa. Const. art. II, § 3 (1873).

The provisions of the 1873 Constitution are particularly important in this consideration because that Constitution and its reference to terms are the provisions which remain in force today. Staggered terms have always been a constitutional requirement in Pennsylvania.

The 1968 Convention was a limited Convention which was authorized to make, and only made, recommendations on a limited number of subjects which, it so happens, included legislative reapportionment but not the consideration of terms. However, the Convention might have attempted to alter the staggered term provisions through their reapportionment provisions had they desired to do so. They did not do so and accordingly staggered terms remain an inviolate requirement of the Pennsylvania Constitution.[2]

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[2] During the Constitutional Convention, consideration of the reapportionment sections of Article II, the Convention's Committee on Style and Drafting, raised certain substantive questions. The February 22, 1968, Page 1160 (App. J, pp. 47a-52a.) Convention Journal reports that the Committee was concerned about the continuation of incumbents. The Committee notes that it had been advised by representatives of the Convention's Committee on Legislative Apportionment, that it had intended

> upon reapportionment pursuant to action by the Legislative Reapportionment Commission, all Senators to stand for reelection. The Committee notes that this creates the possibility that some Senators would be faced with the prospect of standing for election three times within a six year period. The Committee appreciates that changes in the terms of Senators are outside the call of the Convention. . . . The Committee observes, however, that the failure of the substantive committee to consider alternative procedures causes, by omission, the same result, i.e., the terms of half of the Senators are effectively reduced to two years in violation of the present Constitution, Article II, § 3. The Committee regards this as an unresolved matter of substance and respectively suggests the following language for the Convention's consideration:
>
> > to the extent possible, any reapportionment plan shall provide for the continuation in office of any Senator whose term would not otherwise expire in the year of the General

The Style and Drafting Committee of the 1968 Convention did criticize the numbering system for Senate districts. In its report it noted that "the arbitrary numbering of legislative districts may permit a sophisticated type of gerrymandering." (App. J, p. 50a) The plan of the Reapportionment Commission for Senate district 44 fulfills that premonition.

Many states provide staggered terms for senators for the purpose of fostering continuity as a part of the legislative scheme. There is, in effect, under the staggered term theory always an institutional memory present in one chamber of the General Assembly. Because there is no provision in either the Pennsylvania Constitution or statutory law suspending the staggered term scheme after each decennial reapportionment there will be "holdover senators".

No one has challenged the staggered term provision and it is undoubtedly a proper and constitutional manner in which to constitute a legislature. *Republican Party of*

Election next following the reapportionment to represent a Senatorial District substantially the same as that from which he was elected.

On February 23rd the Convention debated these proposals. Delegate Devlin, who was Co-chairman of the Committee on Legislative Apportionment advised it was a judgment of his committee "that the schedule of 1873 pertaining to the odd numbered Senatorial Districts running in the presidential year in an even numbered running in the gubernatorial year is still in force and is binding upon the amendment", page 1181. He also advised that he believed that the recommendation of the Committee on Style and Drafting regarding Senators' terms conflicted with a proposal of the Committee on Style and Drafting relating to the assignment of numbers to Senatorial Districts.

Delegate Johnson who was Co-chairman of the Committee on Style and Drafting, on page 1182, discusses the concern that members be put in a position of running for election three times within a six year period but acknowledges that "we do appreciate the changes in the terms of Senators are outside the call of this Convention."

Wisconsin v. Elections Board (of the State of Wisconsin), 585 F. Supp. 603, 606 (E.D. Wisc.), *vacated and remanded on other grounds*, 469 U.S. 1081 (1984); *McCall v. Legislative Assembly*, 291 Or. 663; 634 P.2d 223 (1981); *In re Reapportionment of the Colorado General Assembly*, 647 P.2d 191 (Colo. 1982).

The temporary disenfranchisement of citizens is constitutionally tolerated under either of two related theories. Due to the complexities of the reapportionment process, a temporary loss of voting rights [3] is tolerated when it is an "absolute necessity" or when it is "unavoidable". *See In re Reapportionment of the Colorado General Assembly*, 647 P.2d 191 (Colo., 1982), and *Mader v. Crowell*, 498 F. Supp. 226, 231 (M.D. Tenn. 1980).

In the instant situation, however, the change in number was neither necessary nor unavoidable. The Commission could have and should have moved an appropriately numbered district, in this reapportionment cycle, (an odd number) as had always been done in the past, and an election would have automatically been held in 1992 in that district. The Commission may not create a constitutional crisis when there is a simple and constitutional manner to draw a redistricting plan which will pass constitutional muster.

It is important to distinguish the Commission's current action from the 1966 situation which resulted in court ordered elections in *all* Senatorial districts. The Pennsylvania Supreme Court had warned that such elections might be required. The Court, not the Commission, ordered the elections, and there was an election in each Senatorial district, not just those already scheduled on the staggered term plus one newly created seat.

This is not to say that petitioners do not recognize the complexities of the redistricting process, and that the

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[3] The cases speak of a "delay" in the right to vote.

constitutional mandate of equal protection and § 2 of the Voting Rights Act may inevitably result in the elimination of state legislative seats.

Petitioners are likewise cognizant of case law which has determined that the approval and implementation of an otherwise constitutional plan is not reviewable by the courts just because another party thinks it has a better, or more constitutional approach. In addition, the case law allows the elimination of legislative seats where such a result is necessitated by the reapportionment process. That is not the case in this instance; *no such necessity exists.*

In 1982, the Supreme Court of Colorado, *en banc,* in *In Re: Reapportionment of the Colorado General Assembly,* 647 P.2d 191 (1982), stated:

> Although reapportionment and election scheduling should preserve wherever possible the opportunity for all citizens to vote for a state senator every four years, the complexities of the reapportionment process may result in a six year delay of the opportunity of some persons to vote for a senator. Where this result is *absolutely* necessary, it does not constitute a constitutional deprivation unless the change is shown to be the result of an invidious discrimination.

Id. (emphasis added).

While the Pennsylvania Constitution, in Article II, § 2, provides that the presiding office of the house in which a vacancy has occurred must issue a writ calling for a special election, there is no time prescribed to do so, there is no guarantee that the lieutenant governor will act to ensure that an election takes place, nor is it even certain that the creation of a new district creates a "vacancy". There was no 44th District seat extant in southeastern Pennsylvania prior to the current decennial reapportionment; therefore, does the creation of a new seat, with an old number create a vacancy? Note also that the existing 44th district in western Pennsylvania is

not ripe for election until 1994, and there is a senator who could serve out the term.

The new 44th district will have elected representation of its own choosing in 1994 when it is scheduled for election, assuming that there is no special election called. It will not have elected representation of its own choosing in 1992, absent a special election. Petitioners do not contend that the voters in the newly constituted 44th district will have their votes diluted, or their ability to nominate or elect a candidate of their choice impaired in 1994. Petitioners argue that these citizens will have been disenfranchised for a period of two years (unless the incumbent who resides three hundred miles away may serve), a time during which they will not have the ability to petition those invested with the powers of government for the redress of their grievances through a senator of their own choosing in violation of the First Amendment to the United States Constitution and Article I, § 20, of the Pennsylvania Constitution.

Similarly, the Court in *Reapportionment of the Colorado General Assembly*, stated:

> The Colorado Constitution, Art. V, Section 48 provides that following the federal census, "the senatorial and representative districts shall be established, revised, or altered, and the members of the senate and the house of representatives apportioned among them." This constitutional mandate is not an empty maxim that districts are to be allocated a seat in the general assembly which may or may not be filled for a period of time. Rather, it is a result of either a resident holdover senator or the election of a new senator upon implementation of the reapportionment plan. A contrary construction, which would allow a district to remain unrepresented for two years, *would not only offend this provision of the constitution and fundamental notions of democratic representation, but would also be inconsistent with the system of repre-*

> *sentative government contemplated in other provisions of our constitution.*

Supra (emphasis added).

In addition, the Commission's indefensible action in renumbering the new district as 44, rather than 43, thereby potentially disenfranchising its electors, is violative of Article I, Sections 2 and 5, of the Pennsylvania Constitution. The Commission has interfered with the electors' free exercise of the right of suffrage, as well as interfering with the political powers vested in the people to exercise their inalienable and indefeasible right to alter, reform, or abolish their government in such a matter they think proper.

The Colorado Supreme Court in *In Re: Reapportionment of the Colorado General Assembly*, states further:

> The residents of district 13 will not be able to recall the state senators for whom they originally voted because, as a result of the reapportionment, those senators are located in other districts and the residents of district 13 would not be entitled to vote for the successor of the recalled representative; nor will they be able to exercise the recall power over a new senator representing district 13, since, under the present reapportionment plan, none will exist. A reapportionment plan which virtually nullifies these important constitutional powers cannot be constitutionally sanctioned, *at least where the result can be readily avoided.*
>
> *The election sequencing in these two districts is particularly unjustifiable in light of a constitutionally preferable and easily implemented alternative.* As a result, two senators, a holdover senator and the victor in the 1982 election, will represent district 34 from 1983 to 1985. This is the same period during which district 13 will not be represented. If the Commission were to switch the election dates for districts 13 and 34, each district would be represented by a single senator from 1983 to 1985. We simply note

> this as a preferable solution. It is not our role to mandate a particular solution and we leave that for the Commission's decision guided by the reasons we express for disapproval.

Id. (emphasis added).

The Commission could have easily avoided creating a district not represented by a senator of its own choosing and depriving the citizens of the present 44th district of the services of their senator for a period of two years if it had only numbered the new district as 43. An election would be held without the requirement that the constitutional writ be issued, and the new district in Eastern Pennsylvania would have a senatorial election in 1992. The process would therefore be uncomplicated and no voters would be threatened with disenfranchisement anywhere in the Commonwealth, nor would the 44th's incumbent have to represent a district three hundred miles away. The correction is so simple that it in itself suggests an ulterior motive for the Commission's action.

Where a constitutional crisis can be avoided, it ought to be avoided. *See, In Re Reapportionment of the Colorado General Assembly, supra.* The Commission creates such a problem by its renumbering plan and then declares that it lacks the power to solve that problem, leaving it for the courts, the lieutenant governor or the legislature. It ought not create the problem in the first place.

The failure to elect a senator in the new 44th district would violate the First Amendment of the U.S. Constitution and Art. I § 20 of the Pennsylvania Constitution which guarantee the right of every citizen to redress the government for their grievances. To assume that the lieutenant governor will call an election is not enough. To say the court will do so later if necessary is not enough. The Commission may not create a constitutional crisis when the redistricting could have been acomplished with no such crisis.

IV. THE COMMISSION POLITICALLY GERRYMANDERED THE FINAL PLAN BY UTILIZING POLITICAL REGISTRATION FIGURES RATHER THAN DECENNIAL POPULATION FIGURES AS THE RATIONALE FOR MERGING DISTRICTS 43 AND 44 IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 17(a) OF THE PENNSYLVANIA CONSTITUTION.

The Commission, in violation of both the Pennsylvania and federal Constitutions, politically gerrymandered the Allegheny County senatorial districts by using registration equalization as the rationale for merging the 43rd and 44th districts and moving the 44th to Eastern Pennsylvania.

We do not ask this Court to "extirpat[e] politics from what are the essentially political processes of the sovereign States." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). However, *Gaffney*, in upholding the utilization of a "political fairness principle", will not support the proposition that the Commission may specifically eliminate an incumbent of one party in order to maintain a perceived balance between party registration and the number of senators of each party in a particular region.

> CHAIRMAN CINDRICH: When you look at the shift in the loss in population in the Allegheny County area, what we find is that it had little or no effect on the registration of people there, the party registration. . . . [I]n fact 10 years ago the registration was roughly 70 percent Democrat, 30 percent Republican. Ten years later, same area looking at it from a jet up high, still 70 percent Democrat, 30 percent Republican. I was hard-pressed to determine why that should mean the loss of an incumbent seat for the Democrats. . . . If we had gone the other way we would have the rather anomalous situation of the Allegheny County region having a 70-30 voter registration edge and having a 50-50 party split in terms of the representation in the Senate of Pennsylvania.

> It didn't seem to the Chairman to be an appropriate thing to do.

(App. G, pp. 41a-42a.)

Gaffney gave constitutional approval to the rough utilization of political strengths as a guideline for the drawing of a statewide plan. It cannot be taken as support for using registration figures in specific districts to determine which senator goes and which senator stays. The fact is that the current three Republican senators (out of a total of seven) in the Allegheny County region serve as a result of *elections* not registration, which is as it should be. Additionally, as noted above, the Commission has run roughshod over the odd-even mandate of the Constitution. The Commission has therefore run afoul of the Equal Protection Clause of the Fourteenth Amendment in its zeal to protect a Democratic senator and the Democratic Party in the Allegheny County region from the political downside of an obvious population loss in that area.

Nor can the Commission find any support in the Pennsylvania Constitution for the use of registration figures in this fashion. That document mandates, in Article II, Section 17(a), the creation of a commission in each year following the year of the federal decennial census. By implication, at least, it directs the use of census figures in the drafting process: not registration figures, but population figures. Further, the Commission is charged, in Article II, § 16, of the Pennsylvania Constitution not to divide county, city, incorporated town, borough, township, or ward unless "absolutely necessary". While being mindful of incumbency and of relative statewide party strengths is within the constitutional parameters of the Commission's duties, balancing which incumbents are to be "holdovers" with registration figures in a specific geographical area is not. In any event, such a scheme comes perilously close to proportionality of registration which is

an anathema to the constitutional process of representation in the United States. 42 U.S.C.A. § 1973 *et seq.*[4]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[4] The "jet up high" test used by the Chairman to facilitate drawing the Allegheny region districts so as to avoid leaving too many Republican senators in that area also had another victim. That distracting scheme prevented the creation of a winnable minority seat in Pittsburgh. The gerrymandering of the 44th district and the 43rd district to maintain some perceived party registration "balance" inescapably resulted in the inability to create a winnable minority seat in the 38th district. The Kindle Plan would have created a fifty-one percent minority district in Pittsburgh. That Pittsburgh is ripe for such a district was established in *Metro. Pittsburgh Crusade for Voters v. City of Pittsburgh*, 686 F. Supp. 97 (W.D. Pa. 1988).

APPENDICES

APPENDIX A

[J-32 through 56-1992]

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 190, 191, 194, 196, 197, 199, 200, and 201
E.D. Misc. Docket 1991

Nos. 49, 50, 51, 52, 53, 54, 56, and 57
M.D. Misc. Docket 1991

Nos. 124, 132, 133, 134, 135, 136, 137, 138, and 141
W.D. Misc. Docket 1991

IN RE 1991 PENNSYLVANIA LEGISLATIVE
REAPPORTIONMENT COMMISSION

Appeals of the 1991 Pennsylvania Legislative
Reapportionment Commission's Final Plan

Argued and Submitted: January 25, 1992

OPINION

NIX, C.J. FILED: May 1, 1992

FACTS

The Reapportionment Plan at issue is the third reapportionment plan since the 1968 amendment to the Pennsylvania Constitution that created the Legislative Reapportionment Commission. *See* Pa. Const. Art. II § 17.

The Legislative Reapportionment Commission consists of five members. *Id.* The majority and minority leaders

of the House and the Senate, or their appointed deputies, choose the fifth member of the Commission as its chair. *Id.* If the Commission cannot agree on a chair, the Supreme Court is empowered by the Constitution to appoint the chair. *Id.*[1] The Commission acts by a majority of its members. *Id.*

On September 25, 1991, a majority of the Commission adopted the preliminary Legislative Reapportionment Plan. After objections were filed by the petitioners and publicly heard at a meeting on October 9, 1991, the Commission adopted the final plan on November 15, 1991. That plan is now the subject of our review. Pursuant to Subsection 17(d) of Article II of the Pennsylvania Constitution, the above-captioned appellants filed appeals to this Court within thirty days. *See* Pa. Const. Art. II § 17. On January 25, 1992, oral argument was heard on twenty-three matters, and two matters were submitted on the briefs.

On February 14, 1992, this Court entered an order that the Final Plan was not contrary to the law and denied the appeals. In that order we stated that an opinion would follow.[2]

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[1] This year the Supreme Court appointed Robert J. Cindrich as chairman of the Legislative Reapportionment Commission. *See* In Re Appointment of Chairman of the Legislative Reapportionment Commission, Judicial Administration Docket No. 105A, May 6, 1991.

[2] Mr. Justice Larsen did not participate in the consideration or decision of these cases.

Mr. Justice Flaherty did not participate in the consideration or decision of Nos. 190, 194, 196, 199 and 201 E.D. Misc. Dkt. 1991; Nos. 49 and 51 M.D. Misc. Dkt. 1991; and No. 138 W.D. Misc. Dkt. 1991.

Mr. Justice Papadakos did not participate in the consideration or decision of Nos. 190, 194, 196, 199 and 201 E.D. Misc. Dkt. 1991; Nos. 49 and 51 M.D. Misc. Dkt. 1991; and No. 138 W.D. Misc. Dkt. 1991.

ISSUES

The present issues before this Court are whether the Final Plan comports with the Pennsylvania and United States Constitutions and the Voting Rights Act. 42 U.S.C. § 1971, *et seq.* Twenty-five appellants raise a number of similar issues regarding different counties and representative and senatorial districts. These issues may be characterized in the following ways:

1) Did the Reapportionment Commission violate the constitutional requirement of compactness and contiguity and equality of population and the prohibition against the division of political subdivisions unless absolutely necessary?

2) Did the Reapportionment Commission's Final Plan violate Federal Constitutional law by depriving various appellants of their rights under the Fourteenth Amendment to the United States Constitution?

3) Does the Plan fail for lack of an effective date, or in the alternative, may the court declare the effective date?

4) Is the Reapportionment Commission prohibited from renumbering even-numbered Senatorial Districts in a year in which odd-numbered seats are elected, in order to avoid the possibility of a special election?

5) Does the Final Plan reflect political gerrymandering which deprives two aspirants of their rights to run for office in their former districts?

6) Did the Final Plan violate provisions of the Voting Rights Act, 42 U.S.C. § 1971, *et seq.*?

7) May this Court order Discovery of the Commission members to determine motives for the Reapportionment Plan?

STANDARD OF REVIEW

The Constitution of this Commonwealth directs this Court to entertain appeals from any aggrieved person within thirty days of the filing of the final plan. Pa. Const. Art. II § 17(d). "If the *appellant establishes* that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order." *Id.* (emphasis added). As the Constitution clearly states, and as we have held in the past, "to prevail in their challenge to the final reapportionment plan, appellants have the burden of establishing not . . . that there exists an alternative plan which is 'preferable' or 'better', but rather that the final plan filed by the Pennsylvania Reapportionment Commission fails to meet constitutional requirements." *In re Reapportionment Plan for Pennsylvania General Assembly*, 497 Pa. 525, 532, 442 A.2d 661, 665 (1981); *see also Gaffney v. Cummings*, 412 U.S. 735, 750-51 ("what is to happen to the Master's Plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like these must end at some point but that point constantly recades if those who litigate need only produce a plan that is marginally better when measured against a rigid and unyielding population equality standard.").

Our Constitution empowers the Legislative Reapportionment Commission to reapportion the Commonwealth. Furthermore, this Court may only undertake to reapportion the Commonwealth if the Commission has not filed a plan within the constitutionally prescribed time limits, Pa. Const. Art. II § 17(g); absent that, this Court may only remand an unconstitutional plan back to the Commission for redrafting. *Id.* at § 17(d).

BACKGROUND

In the landmark decision recognizing the link between state legislative apportionment and the right to equal protection under the laws of the states in the Fourteenth Amendment to the United States Constitution, the Supreme Court of the United States in *Reynolds v. Sims*, 377 U.S. 533 (1964), held that "the Equal Protection clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as practicable". *Id.* at 577. The Court established a framework for states to reapportion legislative districts built upon the notion that "the overriding objective must be substantial equality of population among the various districts." *Id.* at 579. The Court recognized that the states have a legitimate interest "to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." *Id.* at 578. Because those two notions of equality of population and integrity of political subdivisions necessarily conflict, the Court clearly established equality of population as the controlling factor, holding that "permitting deviations from population based representation does not mean that each local governmental unit or political subdivision can be given separate representation regardless of population." *Id.* at 580-81.

At the same time that the Supreme Court of the United States was reviewing the state apportionment plan of the State of Alabama, this Court sustained the objections of Pennsylvania voters to the current reapportionment statutes. In *Butcher v. Bloom* [hereinafter referred to as *Butcher I*], 415 Pa. 438, 209 A.2d 556 (1964), this Court, having heard oral argument on the case prior to the filing of the opinion in *Reynolds v. Sims*, *supra*, relied on the United States Supreme Court's ruling in its disposition of the case. This Court reviewed Sections 16 and 17 of Article II of the Pennsylvania Constitution of

1874 which governed the reapportionment of Senate and House districts in the Commonwealth after each federal decennial census. *Id.* at 444, 209 A.2d at 559.[3] This Court held that these constitutional provisions did not violate the Fourteenth Amendment to the United States Constitution. *Id.* at 461-65, 203 A.2d at 570-571. How-

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[3] Those two sections provide as follows:

Sec. 16. Senatorial districts; ratio

The State shall be divided into fifty senatorial districts of compact and contiguous territory as nearly equal in population as may be, and each district shall be entitled to one Senator. Each county containing one or more ratios of population shall be entitled to one Senator for each ratio, and to an additional Senator for a surplus of population exceeding three-fifths of a ratio, but no county shall form a separate district unless it shall contain four-fifths of a ratio, except where the adjoining counties are each entitled to one or more Senators, when such county may be assigned a Senator on less that four-fifths and exceeding one-half of a ratio; and no county shall be divided unless entitled to two or more Senators. No city or county shall be entitled to separate representation exceeding one-sixth of the whole number of Senators. No ward, borough or township shall be divided in the formation of a district. The senatorial ratio shall be ascertained by dividing the whole population of the State by the number fifty.

Sec. 17. Representative districts

The members of the House of Representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the State as ascertained by the most recent United States census by two hundred. Every county containing less than five ratios shall have one representative for every full ratio, and an additional representative when the surplus exceeds half a ratio; but each county shall have at least one representative. Every county containing five ratios or more shall have one representative for every full ratio. Every city containing a population equal to a ratio shall elect separately its proportion of the representatives allotted to the county in which it is located. Every city entitled to more than four representatives, and every county having over one hundred thousand inhabitants shall be divided into districts of compact and contiguous territory, each district to elect its proportion of representatives according to its population, but no district shall elect more than four representatives.

Pa. Const. of 1874 Article II §§ 16, 17.

ever, the finding was coupled with a new interpretation that the prohibition of dividing wards, boroughs or townships in Section 16 must be "subject always to the overriding objective and mandate that such district shall be 'as nearly equal in population as may be.'" *Id.* at 463, 209 A.2d at 570 (quoting Pa. Const. of 1874, Art. II § 16). Likewise, the mandate in Section 17 that "each county shall have at least one representative", Pa. Const. of 1874 Art. II § 17, was interpreted "to require that counties with small population, if necessary, be joined with other counties for the purpose of electing and sharing a representative." *Id.* at 465, 203 A.2d at 571. This interpretation of the Pennsylvania Constitution received the approval of the Supreme Court of the United States. *Scranton v. Drew*, 379 U.S. 40, *vacating Drew v. Scranton*, 229 F. Supp. 310 (M.D. Pa. 1964).[4]

This Court ordered that the 1964 elections be held according to the then existing reapportionment scheme, but retained jurisdiction in the case. We declared that the reapportionment statutes were unconstitutional, and that the 1966 election could not be held under the unconstitutional statutes. Because of the inaction of the General Assembly, on September 25, 1965, this Court proceeded to reapportion the Commonwealth; after receiving proposals from various parties in interest, we adopted a new plan for the reapportionment of the state

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[4] At the same time that this Court was hearing *Butcher I*, the United States District Court for the Middle District of Pennsylvania had declared that Section 16 and 17 of Article II of the Pennsylvania Constitution violated the Fourteenth Amendment guarantee of equal protection in the United States Constitution. *See* 229 F. Supp. 310; *Butcher I*, 415 A.2d at 443 n.5, 203 A.2d a 559 n.5. The District Court enjoined state officials from conducting the 1964 elections. A stay was granted on the District Court order pending appeal to the Supreme Court of the United States, and that Court vacated the District Court's judgment based upon this Court's holding in *Butcher I*. Scranton v. Drew, 379 U.S. at 42; *see* Butcher v. Bloom, [hereinafter referred to as *Butcher II*], 420 Pa. 305, 308 n.7, 216 A.2d 457, 458 n.7 (1966).

into fifty Senatorial Districts and two hundred three Representative Districts. *Butcher II*, 420 Pa. at 310, 216 A.2d at 459. In addition, the Court ordered that the 1966 plan remain "in force and effect until constitutionally altered." *Id.*

In 1968 the citizens of Pennsylvania amended the Constitution, and merged former Sections 16 and 17 into the amended Section 16. Pa. Const. Art. II § 16 (as amended); *see Commonwealth ex rel. Specter v. Levin*, 448 Pa. 1, 5, 293 A.2d 15, 18 (1972). This Section now provides:

> The Commonwealth shall be divided into fifty Senatorial District and two-hundred and three Representative Districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each Senatorial District shall elect one Senator and each Representative District one Representative. Unless absolutely necessary, no county, city, incorporated town, borough, township or ward shall be divided in forming either a Senatorial or Representative district.

Pa. Const. Art. 2 § 16.

DISCUSSION

After both the 1970 and 1980 Federal Census, this Court reviewed the constitutionality of the Pennsylvania Legislative Reapportionment Commission Final Plans. *See In re Reapportionment Plan for Pennsylvania General Assembly*, 497 Pa. 525, 442 A.2d 661 (1982) (hereinafter *In re Reapportionment Plan*); *Commonwealth ex rel. Specter v. Levin*, 448 Pa. 1, 293 A.2d 15, *appeal dismissed*, 409 U.S. 810 (1972) (hereinafter *Specter*). In *Specter*, we held that "the 'overriding objective' of any plan must be 'substantial equality of population among the various districts.'" 448 Pa. at 13, 293 A.2d at 21 (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)). We recognized the inherent conflict in the

Pennsylvania Constitution between the goal of equally populated districts and the directive against dividing any counties, cities, incorporated towns, boroughs, townships or wards. *In re Reapportionment Plan*, 497 Pa. at 535-36, 442 A.2d at 666.

> With a fixed number of legislative seats to be apportioned "as nearly equal in population as practicable" and a "population density of this state [that] is quite uneven" in any apportionment scheme there is a certain degree of unavoidable noncompactness and a certain amount of subdivision fragmentation [that] is inevitable.

Id. (quoting *Specter*, 448 Pa. at 17-18, 293 A.2d at 23). We continue to hold the view that the equality of population necessitates dividing political subdivisions. It would defy logic to argue that counties cannot be divided to apportion the senatorial and the representative districts when the ideal senatorial district population is 237,633, and the ideal representative district population is 58,531, yet fifteen counties have greater populations than the ideal senate district, and forty counties exceed the ideal representative district population. See 110 Pa. Manual 533 (1991)

The 1991 Final Plan has a total population deviation in its fifty senatorial districts of 1.87% from the ideal population of 237,633. The population deviation for the 203 representative districts is 4.94% from the ideal population of 58,531. This plan compares favorably with the final plans in *Specter* and *In Re Reapportionment Plan.*[5]

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[5] Total Percentage Deviation from Ideal District Population (Ideal in Parantheses)

	Senate	House
1991	1.87% (237,633)	4.94% (58,531)
1981	1.93% (237,334)	2.81% (58,456)
1971	4.31% (235,949)	5.45% (58,113)

The Appellants argue that the population equality is not so important that it warrants the division of counties and other political subdivision. They cite federal precedent which has upheld state reapportionment plans with variances of up to 16%.[6] Appellants argue that these cases bind this Court to require greater populations variances to protect the sanctity of political subdivision borders. Appellants are incorrect. The Supreme Court of the United States held that "some deviations from the equal population principle *are constitutionally permissible* with respect to the reapportionment of seats in a state legislature." *Reynolds v. Sims*, 379 U.S. at 579 (emphasis added). This language merely allows a state to apportion seats between districts that are not strictly equal in population; it does not mandate it. Our Constitution requires that the overriding objective of reapportionment is equality of population, and in 1972 and 1981 this Court approved plans in which the overriding objective was equality of population. We see no reason now in 1992 to retreat from those earlier holdings.

EFFECTIVE DATE

Appellants raise the issue of the effective date of the 1992 Reapportionment Plan. Two arguments are raised. First, the plan is unconstitutional because it does not state the effective date and therefore one appellant whose residence is now outside of his senatorial district may not be able to retain his office. The same appellant asked this Court to exercise its extraordinary jurisdiction to declare an effective date of the Plan after the November 1992 election.

The Constitution of the Commonwealth of Pennsylvania is very clear on the effective date of a Reapportionment

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[6] *See* Brown v. Thompson, 462 U.S. 835 (1983) (average deviation of 16%); Gaffney v. Cummings, 412 U.S. 735 (1983) (7.83% maximum deviation); White v. Regester, 412 U.S. 755 (1973) (9.9% maximum deviation).

Plan. Pa. Const. Art. II § 17(e). It states in pertinent part:

> "*When the Supreme Court has finally decided on an appeal* or when the last day for filing an appeal has passed with no appeal taken, *the reapportionment plan shall have the force of law* and the districts therein provided shall be used thereafter in elections to the General Assembly until the next reapportionment as required under this section 17."

Id. (emphasis added).

Appellants request that we declare the effective date to be after the 1992 election with respect to those senatorial districts that are not slated for general election in 1992, i.e., the even-numbered Senatorial Districts. We have no power to grant that relief as our Constitution sets the effective date of the plan as above. The effective date of this plan was February 14, 1992, the day that this Court issued an order dismissing the above appeals.[7]

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[7] Appellant Lewis raises a residency issue as well in his appeal from the final plan, and alleges that it will be impossible for an incumbent senator to have resided in his district for a year before the election, and for all four years of his tenure (as mandated by the Constitution) if the Senatorial Districts are altered by the Reapportionment Commission. This issue is not yet ripe for review because no senator has suffered adverse consequences in the form of losing a seat for failure to satisfy the residency requirement. However, we would note that the constitutional residency requirements may conflict with the constitutional mandate of reapportioning the Commonwealth every ten years. In light of that conflict, it may be necessary that residency requirements be waived when the Commission reapportions the Commonwealth less than one year before an election. These issues and possible resolutions are for the Senate to decide. *See* In re Jones, 505 Pa. 50, 476 A.2d 1287 (1984). This Court will reserve ruling on this issue until such time that a particular party suffers injury at which point we will address the apparent conflict between the constitutional provisions.

44TH DISTRICT

The Final Plan includes a new Senatorial District No. 44 comprising parts of Chester, Lehigh, Berks and Montgomery counties. The former Senatorial District 44 in Western Pennsylvania was merged with District 43. District 44, as an even-numbered District, is not slated for a general election until 1994. *See* 25 P.S. § 2209. Appellants Senator Frank Pecora, Republican Committee of Chester County, and Senator F. Joseph Loeper argue that the new district must be odd-numbered to prevent a lapse in representation. The Commission responds with the argument that neither this Court nor the Commission has the authority to declare the 44th District vacant, but only the Senate has the power. Furthermore, the Commission argues that the citizens in District 44 will not be deprived of a Senator because a special election may be called in the event of a vacancy. *See* 25 P.S. § 2778.

Appellants argue that the staggered election mandated by Section 2209 of the Election Code, 25 P.S. § 2209, will be interrupted by the creation of a new even-numbered district. They argue that the only time the election scheme was interrupted was in 1966 when this Court reapportioned the Commonwealth and ordered that the Senators from the odd numbered-districts be only elected for two years. *See Butcher II*, 420 Pa. at 310, 216 A.2d at 459. Appellants argue that only when this Court declares a prior plan unconstitutional and undertakes to reapportion the Commonwealth itself may the terms of office be shortened. Because this Court had declared in 1964 that the plan was unconstitutional, *Butcher I*, 415 Pa. at 455 and 468, 203 A.2d at 566 and 573, the candidates and incumbents were on notice that their terms may be truncated.

The Constitution clearly states that "the reapportionment shall have the force of law and the districts therein provided shall be used thereafter in elections to the Gen-

eral Assembly *until the next reapportionment as required under this Section 17.*" Pa. Const. Art. II § 17(e) (emphasis added). The Constitution does not state "if required." Thus on its face the Constitution clearly establishes a termination date for the reapportionment plan. Nowhere in Section 17 is there authorization to continue to use a prior plan, and if the Commission fails to produce a plan within the prescribed time limit, "the Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth." Pa. Const. Art. II § 17(g). Therefore, each Senator, whether in an odd- or even-numbered District, is on notice after a Federal Decennial Census that the prior reapportionment plan is no longer effective and the new districts may be drawn in a manner that separates the Senators' districts from their residences. Senator Pecora's and Senator Lewis' appeals are similarly grounded in the fact that the Senators' residences are no longer located within the senatorial districts that they represent. Their only difference is one of degree, i.e., Senator Pecora lives hundreds of miles away from his district, while Senator Lewis only lives in the neighboring district. However, the result is exactly the same. The districts in question are not slated for election until 1994 yet neither district has its duly elected senator residing within his borders.

Our review of the Plan is limited to those enumerated constitutional requirements in Section 16 of Article II of our Constitution. That Section does not include a requirement that all senatorial districts be redrawn in such a manner that incumbent senators remain residents of their redrawn districts. The party leaders of both houses of the General Assembly adequately represent the interests of incumbents and it is within their sole discretion as members of the Legislative Reapportionment Commission to consider those interests when renumbering and redrawing the legislative districts.

In addition, Senators Pecora and Lewis are not automatically expelled from their Senate seats by the Com-

mission's actions. Only the Senate has the authority to judge the qualifications of its members. *In re Jones*, 505 Pa. 50, 58, 476 A.2d 1287, 1290-91 (1984); *see* Pa. Const. Art. II § 9. In *Jones* we held:

> Article II is concerned with the composition, powers and duties of the legislature. Nothing in this article even remotely suggests the conference of jurisdiction upon the courts to test the qualifications of the members of the General Assembly. Indeed, Section 9 of Article II expressly states that each body of the General Assembly shall be the judge of the qualifications of its members.

In re Jones, 505 Pa. at 58, 476 A.2d at 1291 (footnote omitted). Thus the Senators incorrectly characterize the Commission's actions as depriving the Senators of their offices.

Assuming that the Senate does not seat Senators Pecora and Lewis, nonetheless the Senators are not being deprived of a constitutionally protected interest. Appellants' interest in their offices is a "highly circumscribed" interest. *Sweeney v. Tucker*, 473 Pa. 493, 524, 375 A.2d 698, 713 (1977).

> An elected office is a public trust, not the private domain of the officeholder. A member of the Legislature has a profound responsibility to represent his constituents in the formation of public policy in this state. He holds office for the benefit of his constituents . . . [and] is periodically accountable to his constituents through the electoral process. . . . A member of the Legislature is thus subject to the political process at all times. . . . This is properly so for the public interest in the office far outweighs any private interest of the officeholder. An elected official can never have tenure in the same sense as an ordinary public employee.

Id. Thus as we have held in the past, elected officials' interest in their offices does not merit constitutional pro-

tection. *Id. See also In re Reapportionment of the School District of the City of Pittsburgh*, 507 Pa. 128, 488 A.2d 1106 (1985) (school directors have no legal right to serve out their elective terms superceding need for reapportioning of school districts); *Commonwealth v. Moir*, 199 Pa. 524, 49 A. 351 (1901); *Lyons v. City of Pittsburgh*, 137 Pa. Commw. 130, 586 A.2d 469, *allocatur denied*, —— Pa. —— 593 A.2d 845 (1991).

These appellants, and the Republican Committee of Chester County and Senator Loeper raise the argument that the citizens of the Sixth and Forty-fourth Senatorial Districts will be without senators for the next two years and will be deprived of the right to petition the government for redress of their grievances. This argument also fails.

If the Senate will not seat Senators Pecora and Lewis, the citizens of the district will be represented in the Senate by operation of the special election statute. *See* 25 P.S. § 2778.[8] Anytime a vacancy occurs in a legislative district, the presiding officer of the house is required to

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[8] § 2778. Special elections for Senator and Representative in The General Assembly

Whenever a vacancy shall occur in either house of the General Assembly whether or not it then be in session, the presiding officer or such house shall issue a writ of election to the proper county board or boards of election and to the Secretary of the Commonwealth, for a special election to fill said vacancy, which election shall be held on a date named in the writ, which shall be not less than sixty (60) days after the issuance of said writ. The presiding officer may fix, in such writ of election, the date of the next ensuing primary, municipal or general election as the date for holding any such special election: Provided, however, That should the Governor after the issuance of said writ of election advise the presiding officer that the General Assembly will be called into extraordinary session prior to the date set for such special election, the presiding office may countermand the writ theretofore issued and shall issue a new writ of election, fixing therein such earlier date therefor as is deemed expedient, but which shall not be less than sixty (60) days after the issuance of said writ.

call for a special election. *Id.* This is regardless of the underlying cause of the vacancy, be it death, resignation or expulsion. It is to be noted that the appellants are not arguing that the special election statute itself is an unconstitutional deprivation of the citizen's right to elect legislators and to petition the government for redress of grievances. No persuasive reason has been offered to hold that the special election statute in its application to a vacancy created by the reapportionment is unconstitutional.[9]

GERRYMANDERING

Appellants' claims may be categorized as a denial of access to the political process. They include a claim of political gerrymandering, a claim of deprivation of free and equal elections, and a violation of equal protection under the State and Federal Constitutions. These arguments fail.

The Supreme Court of the United States in *Davis v. Bandemer*, 478 U.S. 109 (1986), addressed the political gerrymandering issue in the Indiana General Assembly's Reapportionment Plan after the 1980 census. In that case, the Court upheld the General Assembly's plan which allegedly disadvantaged the Democratic Party. The Court held that a political gerrymandering claim was a justiciable question and that members of one political party could bring a cause of action under the 14th Amendment to the Constitution of the United States Constitution alleging that their votes had been intentionally rendered ineffective to elect the representative of their choice. *Id.* at 126-28. The Court however, reversed the District

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[9] This Court has never addressed the constitutionality of the special election statute for members of the General Assembly. However, in an analogous case, the United States Court of Appeals for the Third Circuit upheld as constitutional the special election statute governing a temporary vacancy in a United States Senate seat. Trinsey v. Commonwealth of Pennsylvania, 941 F.2d 224 (3rd Cir.) *rev'g* 766 F. Supp. 1338 (E.D. Pa.), *cert. denied*, —— U.S. ——, 60 U.S.L.W. 3376 (1991).

Court's verdict in favor of the Democrats because they had failed to establish a case. *Id.* at 143. The Court set out the following elements to prove a case: the plaintiff must establish: 1) intentional discrimination against an identifiable political group; 2) an actual discriminating effect on that group; and 3) a "history of disproportionate results appear[ing] in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id.* at 139. This Court is persuaded by the holding of the Supreme Court of the United States with regard to the elements of a *prima facie* case of political gerrymandering. No appellant here who raises a political gerrymandering claim has established the requisite elements under the three-part test as set forth in *Davis v. Bandemer, supra.*

Appellants Jones' and Roberts' claims of political gerrymandering fail because they are individual candidates seeking to run against incumbents without any evidence of their being part of an identifiable group suffering a history of disenfranchisement or lack of political power. There is no precedent in this state nor in the Federal Courts for a claim arising from the deprivation of an individual's right to run for a particular office nor of a citizens' right to vote for a specific individual.

Appellants claim that the plan violates the constitutional mandate that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. Art. I § 5. This plan does not violate Section 5 of Article I of our Constitution. This Court has defined Section 5 in the following manner:

> '[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the

> right to exercise the franchise does not deny the franchise itself, . . . and when no constitutional right of the qualified elector is subverted or denied him.'

City Council of City of Bethlehem v. Marcincin, 512 Pa. 1, 8, 515 A.2d 1320, 1232 (1986) (quoting *Shankey v. Staisey*, 436 Pa. 65, 69, 257 A.2d 897, 898 (1969), *cert. denied*, 396 U.S. 1038 (1970)). Using this analysis, we find that the Commission's final plan in no way deprives Appellants or any citizens of this Commonwealth of their right to free and equal elections. A candidate's interest in a specific office can only be less than the incumbent's interest, which has already been characterized as "highly circumscribed". *Sweeney v. Tucker*, 473 Pa. at 524, 375 A.2d at 713. The aspirant has a right to run in his district for any office for which he is qualified; however, his right to run for office does not rise to a constitutionally protected level requiring the Legislative Reapportionment Commission to tailor its plan around the residences of political aspirants who seek to challenge a specific incumbent.

VOTING RIGHTS ACT

Several appellants raise objections to the Final Plan based upon the Voting Rights Act, 42 U.S.C. § 1971 *et seq.* (1988). The specific section implicated is Section 2 of the Act which provides:

> § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of

this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1988). The United States Supreme Court described the intended scope of the section as follows:

> Subsection 2(a) prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of a citizen who is a member of a protected class of racial and language minorities. Subsection 2(b) establishes that § 2 has been violated where the "totality of the circumstances" reveal that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Thornburg v. Gingles, 478 U.S. 30, 43 (1986) (quoting 42 U.S.C. § 1973(b)).

It must be recognized that Appellants Loeper, *et al.*, are not bringing an action for relief under the Voting Rights Act, but rather they are challenging the proposed plan on the ground that it does not conform with the Act.[10] They assert that the establishment of minority/majority districts can only be satisfied by providing for the creation of districts which provide the minority/majority district with a 65% minority population. They argue that the Final Plan (with 60% to 62% proportions) fails to comply with the provisions of the Act and, therefore, must be rejected in favor of the plan they offer which establishes the required 65% proportion under the Act. They characterize the districts created under the Commission's plan as minority influence districts, thus assuming the premise they seek to establish. The question presented for our resolution is whether the Commission's plan is defective in this regard. Thus the lynchpin of the Appellants' argument is that, absent the establishment of a 65% minority population, the Commission's plan is fatally flawed and thus must be rejected. For the reasons that follow, we find this assertion to be without merit.

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[10] Appellants Clarence Thompson, Leroy Green and Henrietta Bennett all raise claims under Section 2 of the Voting Rights Act as "aggrieved persons", 42 U.S.C. 1973. While it is true that they satisfy the standing requirements, *see* Roberts v. Wamser, 883 F.2d 617, 621 (8th Cir. 1989) ("those seek[ing] judicial enforcement of the prohibition against the infringement of the right to vote on account of race"), they are not in the proper forum to prosecute a claim under the Voting Rights Act. *See* 42 U.S.C. § 1971(d) (*granting jurisdiction to the United States District Courts*).

Our Constitution requires this Court to determine whether "the plan is contrary to law." Pa. Const. Art. II, § 17(d). Therefore, the plan must be in accord with both State and Federal Law. In this instance it is being argued that Federal Law (i.e., the Voting Rights Act) would be violated by the final plan. Thus, we are called upon to address the legitimacy of the appellants' claim. For the reasons set forth in the text, it is our view that the plan is not contrary to the Voting Rights Act.

The Voting Rights Act, 42 U.S.C. §§ 1971-1974, as amended in 1982, established a statutory cause of action which recognizes claims charging that a "standard, practice, or procedure" *results* in discrimination on the basis of race. 42 U.S.C. § 1973 (hereinafter referred to as Section 2 of the Voting Rights Act). In 1982, Congress amended Section 2 of the Voting Rights Act in response to the United States Supreme Court decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

In *Bolden*, a class action was successfully brought in the United States District Court for the Southern District of Alabama on behalf of the Black residents of the City of Mobile. The suit alleged that the City's practice of electing commissioners at large by majority vote unfairly diluted the voting strength of Blacks in violation of the Fourteenth and Fifteenth Amendments of the Federal Constitution. *Id.* The District Court found the City's plan unconstitutional, and the United States Court of Appeals for the Fifth Circuit affirmed the District Court's ruling. *Id.* at 58. On appeal, the United States Supreme Court, although unable to agree on a majority opinion, reversed the decision of the United States District Court. Justice Stewart, in an Opinion Announcing the Judgment of the Court, joined by then Chief Justice Berger and Justices Powell and Rehnquist, reasoned that, once the court below found that Blacks could register and vote without hindrance, it was error to find that the Fifteenth Amendment was offended. *Id.* at 65. This conclusion was based upon the premise that the Fifteenth Amendment does not guarantee the right to have Black candidates elected, but prohibits only intentionally discriminatory denial or abridgment by the government of the freedom to vote on account of race. These justices also found no purposeful discrimination in the voting practices under the guarantee of equal protection under the Fourteenth Amendment in view of the failure of the evidence presented to establish that the at-large voting

practice was a purposeful device to further racial discrimination. *Id.* at 74.[11]

In dissent, Mr. Justice Marshall articulated the view that proof of a discriminatory purpose to support a claim of vote dilution in violation of the Fourteenth and Fifteenth Amendments is not necessary. *Id.* at 103-105. To the contrary, he reasoned that the City's at-large electoral scheme was violative of the Fourteenth and Fifteenth Amendments since it had the unconstitutional effect of diluting the Black vote.[12] He reasoned that even if it were necessary to support a claim under these constitutional amendments with a showing of discriminatory purpose, that requirement had been satisfied by showing that official action was produced by pervasive racial bias as shown in the evidence in the case under consideration

Justice Brennan dissented and agreed with Justice Marshall that proof of a discriminatory impact was sufficient in the matter then before the Court and alternatively that discriminatory intent had been proven. *Id.* at 94. Justice White also in dissent expressed the view that discriminatory purpose could be and had correctly been inferred from the evidence of discriminatory impact. *Id.* at 94-103.

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[11] Justice Blackman concurred in the result, *id.* at 80, and Justice Stevens concurred in the judgment, *id.* at 83.

[12] One distinction between the opinion of the Court and the dissenting opinion of Mr. Justice Marshall is that Mr. Justice Marshall characterized the right to cast an effective vote as fundamental. As a result, the deprivation of a fundamental right requires strict scrutiny without any showing of discriminatory purpose. This differs from the plurality's decision that the only fundamental right is participation on equal footing with other voters. There is no constitutional right to equal representation for identifiable political groups, and, therefore, a deprivation of the right to equal representation based upon racial consideration must be accompanied by a discriminatory purpose in order to merit strict scrutiny.

Following the *Bolden* decision,[13] the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), set forth the elements that must be established by plaintiffs to declare a plan violative of the Voting Rights Act. The Court required the plaintiffs to show that:

> [F]irst, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single number district. . . . [S]econd, the minority group must be able to show that it is politically cohesive. . . . [T]hird, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Id. at 50-51 (citations and footnote omitted).

We will first address the complaint being raised to the Plan as it relates to the Senatorial Districts representing the City of Philadelphia. Appellants argue that the plan for Philadelphia fails to provide for any minority/majority districts where the minority population warrants such districts. Specifically, appellants assert that the plan drafted by the Commission has no "classic [Senatorial] minority/majority districts." Appellants argue that the Commission "deliberately created a retrogressive plan resulting in the destruction of the three existing minority/majority seats and replacing them with four minority influence districts." Appellants further charge that their proposed plan included four "classic" minority/majority senatorial districts within Philadelphia.

Prior to the 1991 reapportionment, three out of the seven Senatorial Districts from Philadelphia were minority/

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[13] As a result of the *Bolden* decision, Congress, in 1982, amended the Voting Rights Act and created what is now known as the "results test". The Supreme Court, in 1986, interpreted the "results test" for the first time after the amendment in Thornburg v. Gingles, 478 U.S. 30 (1986).

majority districts, each being represented by Black senators.[14] The plan proposed by the Commission also provides for a fourth minority/majority senatorial seat for Philadelphia. In both the Commission's plan and the plan proposed by the petitioners, the four proposed Senatorial Districts would contain a majority of voting age minorities. The issue being raised is the size of the minority's voting age proportion that is required under Section 2 of the Voting Rights Act to be classified as a minority/majority district.

It must be emphasized that the scope of the instant challenge is very narrow. The test that has been established for determining the viability of the Commission's plan is whether or not the plan meets constitutional requirements. Pa. Const. Art. II § 17(d). The mere fact that other plans may be offered is of no moment, unless appellants establish that the plan submitted by the Commission is "contrary to law." Pa. Const. Art. II § 17(d); *see In Re Reapportionment Plan*, 497 Pa. at 932, 442 A.2d at 665; *see also Gaffney v. Cummings*, 412 U.S. at 750-51. Once that plan is found to meet constitutional mandates, the issue of the merits of any proposed plan is irrelevant. *Id.*

The issue to be focused upon is the interpretation sought by appellants to determine when a group is to be considered "sufficiently large and geographically compact to constitute a majority in a single member district . . . ." *Thornburg v. Gingles*, 478 U.S. at 50 (1986). Appellants insist that this requires the creation of districts with 65% minority populations. The Commission's plan created four minority/majority districts ranging from 60%

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[14] The Third Senatorial District is currently represented by Senator Roxanne H. Jones, the Seventh Senatorial District is currently represented by Senator Chakah Fattah, and the Eighth Senatorial District is currently represented by Senator Hardy Williams. 110 Pa. Manual 95-96 (1991). None of the present incumbents have joined in the instant attack upon the Commission's plan, nor have they evinced in any way their concurrence in the alleged concerns.

to 62% of minority population (56% to 58% voting age population). There is no requirement under Federal law for a 60% to 65% minority population; indeed in *Mississippi Republican Executive Committee v. Owen H. Brooks, et al.*, 469 U.S. 1002 (Memorandum Opinion), *aff'g Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984), the Supreme Court of the United States affirmed the reapportionment plan of the United States District Court for the Northern District of Mississippi which created a second minority district with a majority of 52.8% black voting age population.[15] Here the Commission's final plan provides for four (4) minority/majority senatorial districts in Philadelphia, ranging in Black voting age population percentages from 56% to 58%. The Philadelphia Senatorial Delegation under the new plan would consist of seven (7) Senators, three (3) of whom also represent areas from counties surrounding Philadelphia county. Clearly the Commission has attempted to increase minority representation by creating four (4) minority/majority senate seats in Philadelphia whereas the prior plan included only three (3) minority/majority seats.

One of the intents of Congress in its passage of the Voting Rights Act and its subsequent amendments was incorporating minority voters into the entire political process. *See Thornburg v. Gingles*, 446 U.S. at 36-38. This intent can best be served by having the greatest

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[15] The 65% figure has been used by the Department of Justice as a benchmark for preclearance procedures when a state submits its reapportionment plan to the Department of Justice for approval. United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977); Bybicki v. State Board of Elections of Illinois, 574 F.Supp. 1147, 1149 n.4 (N.D. Ill. 1983). However, this 65% benchmark has never been required by the courts, particularly in a district or state which has not been the subject of a determination by the Attorney General under 42 U.S.C. § 1973(b) that tests or devices are maintained to deny or abridge the right to vote based upon racial considerations. Therefore, there is no reason nor authority for this Court to recognize this benchmark in the present appeal.

number of minority/majority districts possible. The statutory language prescribing minority participation in the political process is maximized when there are more and not fewer opportunities for minorities to elect representatives of their choice.[16] While in this instance both plans could provide four senate seats in minority/majority districts, the plan adopted by the Commission provides for the optimum distribution of the Black population in a manner that would support electing or influencing additional representatives of their choice.

The 1991 plan, which creates an additional minority/majority senatorial district is based on the assumption that minority/majority district requirements are satisfied where the Black voting age population is maintained between 58% and 56%. The plan provides for Senate District No. 3 which will have a Black population of 60.63% and a Black voting age population of 58%; Senate District No. 4 which will have a 61.52% Black population and a Black voting age population of 58%; Senate District No. 7 with a Black population of 61.81% and a Black voting age population of 58%; and finally Senate District No. 8 with a Black population of 60.14% and a Black voting age population of 56%. Thus the ultimate result is that Blacks voters would have the opportunity to enjoy majority status in four (4) of the seven (7) Philadelphia senatorial districts. This result clearly fits within the intent of the Voting Rights Act.

Appellant Loeper also argues that the Commission failed to create a minority influence senate seat in Pittsburgh. A minority influence claim is one "brought by a minority group, not sufficiently large and compact to constitute a majority in a single-member district and

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[16] The inability of Blacks historically to exercise the right to vote granted by the Fifteenth Amendment was not the result of apathy, but rather from the Black voters' inability to overcome barriers set up by hostile Whites which included poll taxes, literacy tests, intimidation, violence and other schemes more subtle to discourage their participation.

thereby *elect* the candidate of their choice, but sufficiently large and geographically cohesive to *influence* elections." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.12 (1986). *See Chisom v. Roemer*, 501 U.S. ——, —— n.24, 115 L. Ed. 2d 348, 364 n.24 (1991); *McNeil v. Springfield Park District*, 851 F. 2d 937, 947 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). This claim has been raised in the federal courts and consistently denied as neither constitutionally nor statutorily required. *See, e.g., Chisom, supra; McNeil, supra; but see, Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991).[17] This Court, limited in its review of the plan to the constitutional and statutory requirements, is provided no authority to ascertain the appropriate population percentages for the creation of minority influence districts.[18]

DISCOVERY

The final request of various appellants is for this Court to Compel Discovery of the underlying motives and purposes of the Commission members and its staff. The Commission raises legislative immunity in its response to Appellants' discovery requests. We need not resolve this

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[17] The present appeal is clearly distinguishable from the facts and holding of the *Armour* decision. In *Armour*, the three-judge panel of the District Court found that there was historical and intentional discrimination violating the Voting Rights Act, and Fifteenth Amendment to the United States Constitution, and the Constitution of Ohio. 775 F. Supp. at 1061. It is also noteworthy that the relief ordered by the court in *Armour* resulted in a minority influence district constituting "nearly one-third of the voting age population." *Id.* at 1059. In this case, the minority population of the 38th Senatorial District is greater than 34%.

[18] It should be noted that the final plan does contain the 38th Senatorial District in Allegheny County with 34% African-American population. Without establishing any criteria for minority influence districts, this Court would note that it would appear that 34% of the population of a district would provide the minority an opportunity to influence the outcome of elections. *See* Chisom v. Roemer, 501 U.S. at —— n.24, 115 L. Ed. 2d at 364 n.24.

issue because we have already held that the plan on its face does not violate the Constitution of Pennsylvania, the Constitution of the United States, or the Voting Rights Act. Therefore any evidence of the motives or discussions of the Commission or its staff is irrelevant and those requests are denied.

CONCLUSION

Accordingly, the final plan of the 1991 Legislative Reapportionment Commission for the Pennsylvania Senate and House of Representatives complies with all constitutional and statutory requirements, and shall be used hereafter in elections to the General Assembly until the next Reapportionment is constitutionally required.

Mr. Justice Larsen did not participate in the consideration or decision of these cases.

Mr. Justice Flaherty did not participate in the consideration or decision of Nos. 190, 194, 196, 199 and 201 E.D. Misc. Dkt. 1991; Nos. 49 and 51 M.D. Misc. Dkt. 1991; and No. 138 W.D. Misc. Dkt. 1991.

Mr. Justice Papadakos did not participate in the consideration or decision of Nos. 190, 194, 196, 199 and 201 E.D. Misc. Dkt. 1991; Nos. 49 and 51 M.D. Misc. Dkt. 1991; and No. 138 W.D. Misc. Dkt. 1991.

APPENDIX B

[J-32 through 56-1992]
IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 190, 191, 194, 196, 197, 199, 200, and 201
E.D. Misc. Docket 1991

Nos. 49, 50, 51, 52, 53, 54, 56, and 57
M.D. Misc. Docket 1991

Nos. 124, 132, 133, 134, 135, 136, 137, 138, and 141
W.D. Misc. Docket 1991

Petitions for Review of the 1991 Pennsylvania
Legislative Reapportionment Commission's
Final Plan

IN RE 1991 PENNSYLVANIA LEGISLATIVE
REAPPORTIONMENT COMMISSION

ARGUED: January 29, 1992

ORDER

PER CURIAM

AND NOW, this 14th day of February, 1992, pursuant to Article 2, Section 17(d) of the Pennsylvania Constitution, this Court, after consideration of the objections raised in the above-captioned petitions, finds that the Final Plan of the 1991 Pennsylvania Legislative Reapportionment Commission is not contrary to law, and the Petitions for Review are denied.

The deadline of February 18, 1992 for filing of nominating petitions is hereby extended until the close of business hours on Friday, March 6, 1992.

It is further ordered that as to the nominating signatures acquired prior to the date of this order, the same shall be deemed valid as to timeliness, subject, however, to any other statutory challenge.

Opinions will follow.

Mr. Justice Larsen did not participate in the consideration or decision of these cases.

Mr. Justice Flaherty did not participate in the consideration or decision of Nos. 190, 194, 196, 199 and 201 E.D. Misc. Dkt. 1991; Nos. 49 and 51 M.D. Misc. Dkt. 1991; and No. 138 W.D. Misc. Dkt. 1991.

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TRUE AND CORRECT COPY:

Attest: February 14, 1992

/s/ Shirley Bailey
Chief Clerk

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 201 E.D.
Misc. Docket

F. JOSEPH LOEPER, State Majority Leader FRANK T. BUDZYDLOWSKI, CLARENCE THOMPSON, DANIEL A. TORISKY, LEROY GREEN, and SALLY MEMINGER,
Petitioners,

vs.

1991 PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT COMMISSION,
Respondent.

AMENDED PETITION FOR REVIEW

To: The Legislative Reapportionment Commission

You are hereby notified to file a written response to this Amended Petition for Review ("Petition") within 30 days after service of the Petition pursuant to rule 1516 of the Pennsylvania Rules of Appellate Procedure, or a judgment may be entered against you.

1. Jurisdiction of this Honorable Court is based upon § 17(d) of Article II of the Constitution of Pennsylvania, 42 Pa. C.S.A. § 725 (Purdons 1981) and Pennsylvania Rules of Appellate Procedure, Rule 3321 and Rule 1501, and in accordance with Rule 1511.

2. Pursuant to the Pennsylvania Rules of Appellate Procedure, Rule 1517, and Pennsylvania Rules of Civil Procedure, Rule 1028(c), Plaintiffs F. Joseph Loeper, Frank T. Budzylowski, Clarence Thompson, Daniel A.

Torisky, Leroy Green, and Sally Meminger, file this Amended Petition for Review and aver as follows.

3. F. Joseph Loeper, "Petitioner", has standing to bring this action because he is a citizen, taxpayer, and registered voter of the Commonwealth of Pennsylvania and the county of Delaware, and a member of the Pennsylvania Legislative Reapportionment Commission, "Respondent".

4. Petitioner files this Amended Petition as an aggrieved person, taxpayer, citizen, registered voter, member of the Legislative Reapportionment Commission and ex officio as the Majority Leader of the Pennsylvania Senate.

5. Frank T. Budzydlowski, of 1025 Bingham Street, Philadelphia, PA 19115, is a citizen of the Commonwealth of Pennsylvania and a registered voter in the city and and county of Philadelphia.

4. Clarence Thompson, of 1722 West Wellington Street, Philadelphia, PA 19121, is a citizen of the Commonwealth of Pennsylvania, an African-American and therefore a member of a protected class, and is a registered voter in the city and county of Philadelphia.

5. Daniel A. Torisky, of 738 Greenleaf Drive, Monroeville, PA 15146, is a citizen of the Commonwealth of Pennsylvania, and a registered voter in the 44th Senatorial District.

6. Leroy Green, of 7873 Mark Drive, Verona, PA 15147, is a citizen of the Commonwealth of Pennsylvania, an African-American and therefore a member of a protected class, and a registered voter in the 44th Senatorial District.

7. Sally Meminger, of 932 Lawrence Drive, Emmaus, PA 18049, is a citizen of the Commonwealth of Pennsylvania, and a resident of the proposed new 44th Senatorial District.

8. Respondent is a body constituted in accordance with the power and authority granted by *Pa. Const.* § 17, and is therefore empowered by the people of the Commonwealth to effect a legislative reapportionment plan.

9. On September 25, 1991, the Legislative Reapportionment Commission met and following its review and discussion of the Preliminary Reapportionment Plan for the Commonwealth of Pennsylvania, and after a majority vote of the Commission adopting the Plan, ordered the Plan to be filed with the officer of the Commonwealth of Pennsylvania charged with the supervision of elections.

10. On September 25, 1991, during the Legislative Reapportionment Commission meeting, Petitioner expressed his objections to the Preliminary Reapportionment Plan which appear in the stenographic report of the meeting and are part of the official record of the Legislative Reapportionment Commission.

11. On October 9, 1991, during the public hearing on the Preliminary Reapportionment Plan, Petitioner reiterated his objections, which appear in the stenographic report of the hearing and are part of the official record of the Legislative Reapportionment Commission.

12. On November 15, 1991, during the Legislative Reapportionment Commission's final public meeting on the Preliminary Reapportionment Plan, Petitioner reiterated his previous objections, declared additional objections, offered several amendments, and voted against the final Legislative Reapportionment Plan.

13. At the public meeting on November 15, 1991, a majority of the members of the Legislative Reapportionment Commission voted against the amendments to the Final Legislative Reapportionment Plan proffered by Petitioner.

14. With Petitioner voting in the negative, the Legislative Reapportionment Commission, by a vote of 3-2 adopted the Commonwealth's Final Reapportionment

Plan on November 15, 1991; this Petition for Review follows.

15. The objections to the Final Reapportionment Plan which the Respondent has rejected and which form the basis for this Petition for Review are as follows:

(a). The Respondent, by enacting the Final Reapportionment Plan, has violated provisions of the Constitution of Pennsylvania, including Article I, §§ 2, 5, 12, 20 and 25; Article II, §§ 1, 2, 3, 16, 17(a) and 17(c), Article III, § 27; and provisions of the Constitution of the United States, including First and Fourteenth Amendments, and § 2 of the Voting Rights Act of 1965, as amended.

(b). The Respondent violated the above enumerated state and federal constitutional provisions by:

1. Combining the 43rd and 44th Senatorial Districts and renumbering the new district, number 43, thereby unconstitutionally and unnecessarily abbreviating the state constitutionally mandated term of an elected member of the Senate not scheduled for election until 1994, violating *Pa. Const.* art. I, §§ 12 and 25, art. II, §§ 1, 2, and 3 and art. III, § 27; and

2. Affixing the number 44 to a new senatorial district resulting in the need to call a special election and disrupting the staggered term scheme mandated by the Pennsylvania Constitution; such special elections must be called by the Lieutenant Governor pursuant to *Pa. Const.*, art. II, § ; the constitution does not mandate the time during which such elections must be called and historically they have not been speedily called; and because citizens do not have the power or authority to call a special election such circumstances could well result in citizens being

without representation or the ability to petition the government for a redress of grievances for a period of two years, violating the First Amendment to the Constitution of the United States, and *Pa. Const.*, art. I, §§ 2, 5, 12, 20, and 25; and

3. Disrupting the constitutionally mandated staggered term scheme, a power and authority not held by the Respondent, therefore exercising authority not granted to it by the citizens of the Commonwealth, and therefore causing circumstances requiring a special election, which the Respondent has no constitutional power or authority to call; no legislatively created body has any power or authority not specifically granted to it, violating *Pa. Const.*, art. I, §§ 2, 5, 12, 20, and 25, and art. III, § 27; and

4. Affixing the number 44 to the new district and disrupting the staggered term scheme which action was not necessary to the accomplishment of a fair and constitutional reapportionment plan; and

5. Using voter registration totals rather than population distribution changes in order to determine to merge the 43rd and 44th Senatorial districts as district 43 and creating a new 44 in eastern Pennsylvania, in violation of *Pa. Const.*, art., I §§ 2, 5, 12, and 25 and art. II, §§ 16, 17(a) and 17(c); and

6. Failing to create a minority influence or majority/minority district where the minority population warranted such a district in Pittsburgh in violation of the Fourteenth Amendment to the Constitution of the United States, and § 2 of the *Voting Rights Act of 1965*, as amended; and

7. Failing to create four majority/minority districts of 65% minority population where the minority population warranted such districts in Philadelphia; instead the Respondents diluted the minority districts in Philadelphia by creating four minority districts of approximately 60% or less minority population, violating the Fourteenth Amendment to the Constitution of the United States, and § 2 of the *Voting Rights Act of 1965*, as amended; and

8. Using voter registration totals rather than population distribution changes in order to determine the appropriate number of majority/minority or minority influence districts and thereby diluting minority influence and retrogressing in both Pittsburgh and Philadelphia, violating the Fourteenth Amendment to the United States Constitution, and *Pa. Const.* art. I, §§ 2, 5, 12, and 25, art. II, §§ 16, 17(a) and 17(c).

9. Unnecessarily dividing counties and wards and crossing political subdivision boundaries particularly in the Pittsburgh and Philadelphia areas, including Delaware and Montgomery Counties, thereby unnecessarily disrupting various communities of interest in violation of the specific mandates of *Pa. Const.*, art. II, 16.

10. Creating a politically gerrymandered final plan by utilizing a scheme of local and statewide "registration equalization", and projected political population growth patterns based on registration and assumed future registration figures rather than on population gain and loss as disclosed by census data, violating the Fourteenth Amendment to the United States Constitution, and *Pa. Const.*, art. I, §§ 2, 5, 12, and 25, and art. II, §§ 16, 17(a) and 17(c).

11. Each and every action of the Respondent affects the Legislative Reapportionment Plan for 1991 in its totality. Changes in any legislative district boundary had an effect on all other legislative district boundaries. In addition, the use of voter registration totals instead of decennial census population totals has distorted the new reapportionment plan, and violates Petitioner's right to equal protection under the Fourteenth Amendment to the United States Constitution as well as the rights to equal protection of each citizen and registered voter of the Commonwealth.

16. Petitioner Loeper, therefore, reaffirms and re-alleges, as against the Respondent's Final Legislative Reapportionment Plan, each and every allegation and basis therefore in the Petitioner's objection and exceptions to the Preliminary and Final Legislative Reapportionment Plans which appear in the official stenographer's record of the Legislative Reapportionment Commission proceedings.

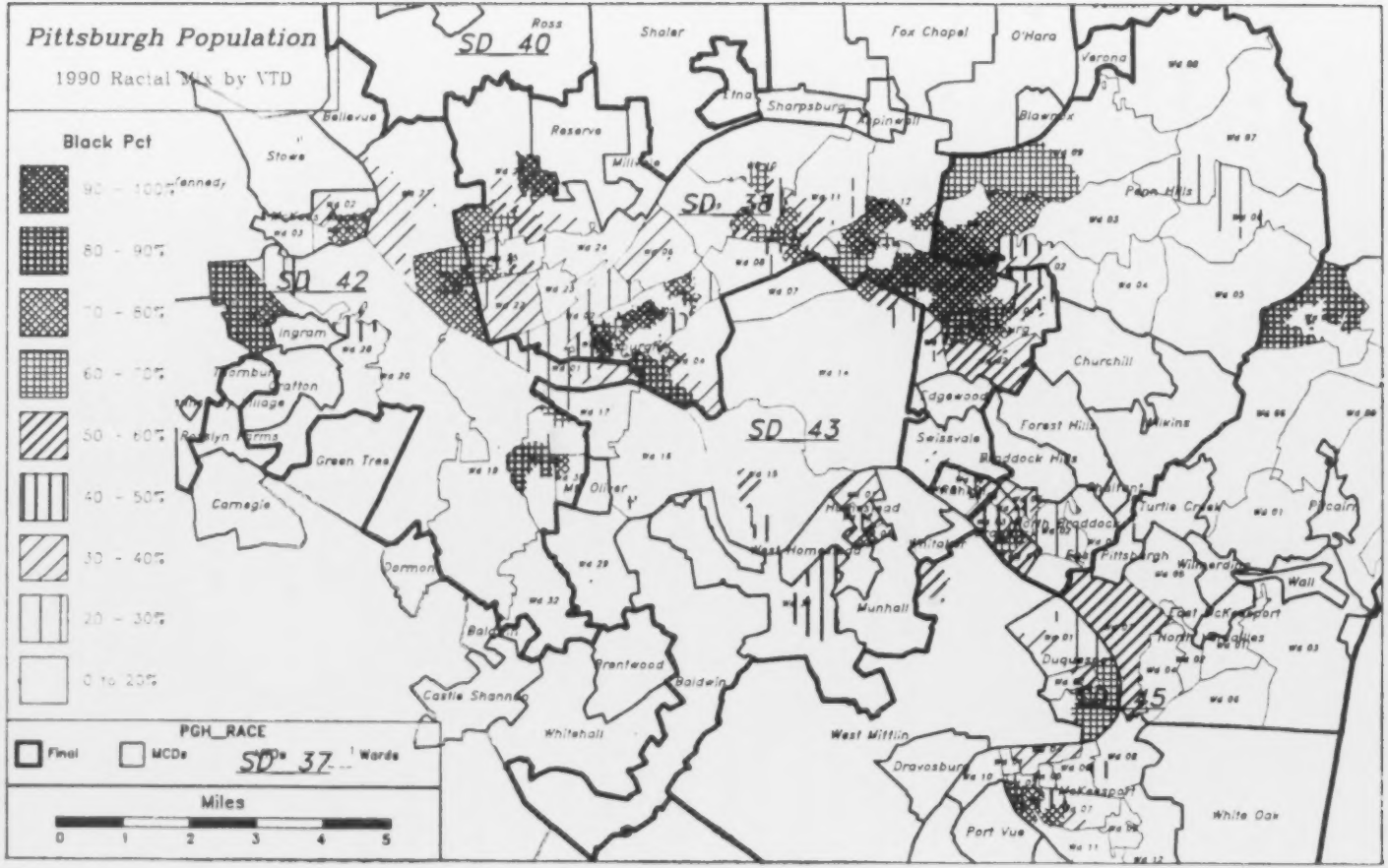
WHEREFORE, your Petitioners pray that this Honorable Court review the Final Legislative Reapportionment Plan of the Legislative Reapportionment Commission, and that:

1. This Court set aside the Final Legislative Reapportionment Plan as adopted by the Legislative Reapportionment Commission and adopt Petitioner Loeper's proffered amendments, or such of them as this Court may find appropriate, as the Final Plan for the reapportionment of the Legislature.

Respectfully submitted,

Montgomery, McCracken,
Walker, and Rhoads
Counsel for Petitioner

By: Mary F. Platt, Esquire



COMMISSION'S PLAN (MINORITY POPULATION DISTRIBUTION)

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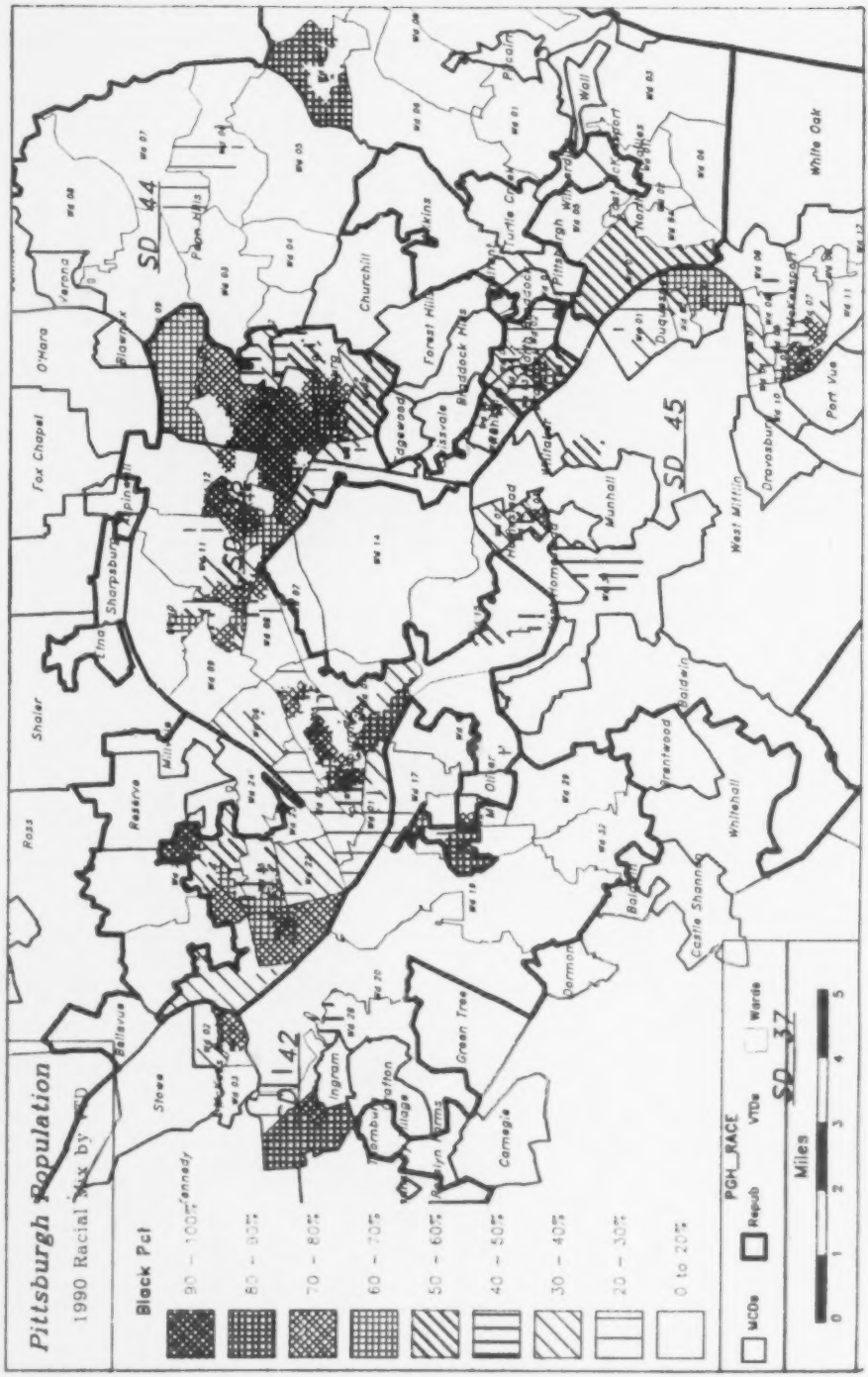
APPENDIX E



PETITIONER LOEPER'S PLAN (MINORITY POPULATION DISTRIBUTION)

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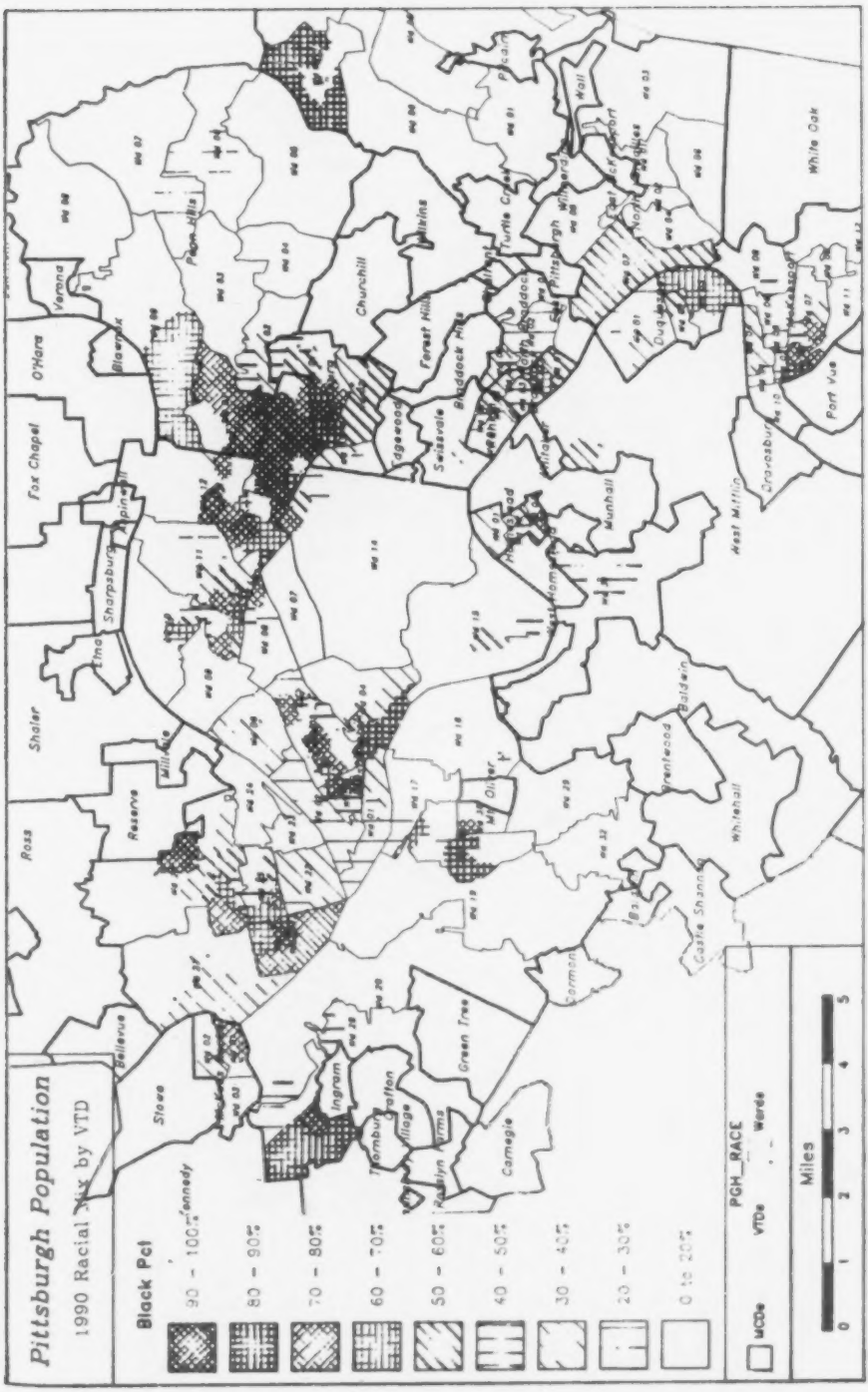
APPENDIX F



MINORITY POPULATION DISTRIBUTION -- NO DISTRICT LINES

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APPENDIX G

COMMONWEALTH OF PENNSYLVANIA
LEGISLATIVE REAPPORTICNMENT COMMISSION

IN RE: PUBLIC HEARING OF THE LEGISLATIVE REAPPORTIONMENT COMMISSION

Stenographic report of hearing held in Room 8A East Wing, Main Capitol Building, Harrisburg, Pennsylvania

Wednesday
September 25, 1991
10:00 a.m.

ROBERT J. CINDRICH, ESQUIRE, CHAIRMAN

MEMBERS OF LEGISLATIVE REAPPORTIONMENT COMMISSION

Sen. Joseph Loeper
Sen. Robert Mellow
Hon. John Perzel
Hon. Allen Kukovich (Deputy Commissioner for Hon. H. William DeWeese)

Also Present:

Ken Gormley, Esquire, Executive Director
Stephen J. Harmelin, Esquire, Chief Counsel
David Woods, Chief of Staff to Senate Majority Leader
Donna Memmi Malpezzi, Counsel to Majority Leader
Stephen MacNett, Gen. Counsel, Senate Republican Caucus
C.J. Hafner, Counsel to Senate Minority Leader
Mark McKillop, Senate Democratic Research
Scott Casper, Executive Director for the House Reapportionment Office

Joseph Murphy, Chief Counsel to House Republican Caucus
Stephen Dull, Director, House Rep. Member Services
Michael Rosenstein, Executive Director, Republican Appropriations Committee

* * * *

[25] Now, as to a couple of other points about demographics. When you look at the shift in the loss in population in the Allegheny County area, what we find is that it had little or no effect on the registration of people there, the party registration. So that while the Republican argument was that the Democrats should lose two seats, in fact 10 years ago [26] the registration was roughly 70 percent Democrat, 30 percent Republican. Ten years later, same area looking at it from a jet up high, still 70 percent Democrat, 30 percent Republican. I was hard-pressed to determine why that should mean the loss of an incumbent seat for the Democrats.

* * * *

APPENDIX H

COMMONWEALTH OF PENNSYLVANIA
LEGISLATIVE REAPPORTIONMENT COMMISSION

IN RE: PUBLIC MEETING OF THE LEGISLATIVE REAPPORTIONMENT COMMISSION

Stenographic report of hearing held in Room 8A East Wing, Main Capitol Building, Harrisburg, Pennsylvania

Wednesday
October 9, 1991
1:00 p.m.

ROBERT J. CINDRICH, ESQUIRE, CHAIRMAN

MEMBERS OF LEGISLATIVE REAPPORTIONMENT COMMISSION

Sen. Joseph Loeper
Sen. Robert Mellow
Hon. John Perzel
Hon. Allen Kukovich (Deputy Commissioner for Hon. H. William DeWeese)

Also Present:

Ken Gormley, Esquire, Executive Director
Stephen J. Harmelin, Esquire, Chief Counsel
David Woods, Chief of Staff to Senate Majority Leader
Donna Malpezzi, Counsel to Majority Leader
Stephen MacNett, General Counsel, Senate Republican Caucus
C.J. Hafner, Counsel to Senate Minority Leader
Mark McKillop, Senate Democratic Research
Scott Casper, Executive Director for the House Reapportionment Office

Stephen Dull, Director, House Republican Member Services

* * * *

[41] Right now I would like to present you with a plan that demonstrates that it is definitely possible to create a minority influence senatorial district in Allegheny County. I would like to submit this plan now. This is a 51-percent minority district here. This is the old one, and I would like to present this, too, and I would also like to list the data on how this can be done to the Commission. Thank you.

The plan creates a senatorial district that would give 51 percent minority population with 112,302 white residents and 120,439 African-American residents. The total population of 236,496 is a deviation of .478 percent from the ideal district size. This district would be located in what is now the 38th Senatorial District, which would take in several wards in Pittsburgh and various communities in the Monongahela Valley.

You have an opportunity to create a district where a minority group in Allegheny County [42] would have a real chance to elect a representative to the State Senate. If you seize it, your action will show that the Commission was interested in giving minority voters a fair say in State government and an opportunity to hold an office in the State Senate. And that is acceptable to the NAACP and challengeable in a court of law. The precedent has been set in the Supreme Court, and the minority voters of Allegheny County expect the Commission to respect them enough to follow it.

And I want to thank you for giving me an opportunity here today to expound on a few of the things that we would like to see done, and we hope that the reapportionment will be fair to adhere to the 1965 Voting Rights Law and include minorities in an area where we can get—we never had a State Senator, and I think the time has come, the world is changing, and we want representation in government like everyone else. We vote for them and we

expect them to vote for us. And as an American I feel that the time is now. And as a person who has been active in fighting for one person, one vote in Johannesburg, South Africa, I'm fighting for the same thing in Penn Hills—one person, one vote.

* * * *

APPENDIX I

CONSTITUTION OF PENNSYLVANIA 1790

Article I, Sec. 9. Immediately after the senators shall be assembled, in consequence of the first election, subsequent to the first enumeration, they shall be divided, by lot, as equally as may be, into four classes. The seats of the senators of the first class shall be vacated at the expiration of the first year, of the second class at the expiration of the second year, of the third class at the expiration of the third year, and of the fourth class at the expiration of the fourth year; so that one-fourth may be chosen every year.

APPENDIX J

CONSTITUTIONAL CONVENTION OF 1968

REPORT OF COMMITTEE ON STYLE AND DRAFTING

REPORT ON COMMITTEE PROPOSALS ONE AND TWO

PRESIDENT BRODERICK. We are happy to recognize the Co-Chairman of the Committee on Style and Drafting, Chairman Johnson.

I ask, is the report ready?

DELEGATE JOHNSON. Yes, Mr. President. May I respectfully request, Mr. President, that the delegation withhold their applause until I have completed my very brief remark?

COMMITTEE ON STYLE AND DRAFTING

519 North Office Building

February 22, 1968

To the Honorable,
The Delegates Assembled,
1967-68 Pennsylvania Constitutional Convention

Mesdames and Sirs:

On behalf of the Committee we are pleased to submit our Report on Committee Proposals One and Two relating to legislative reapportionment.

I. GENERAL

Inasmuch as this is the first formal report of the Committee's deliberations pursuant to Rule 22, it is appropriate that we review the function of the Committee. The Convention has instructed the Committee to do four things:

First. To examine and edit proposals to avoid inaccuracy, repetition, inconsistency or poor drafting, and to consider and make recommendations on any differences, conflicts or unresolved matters of substance.

Second. To paraphrase or regroup language or sections of the proposals so long as, and this was the polester governing the Committee's function, "the sense or purpose of any proposal referred" was not changed.

Third. To recommend referral of proposal to the originating, substantive committee.

Fourth. To resolve any inconsistency or conflict in conference with the originating substantive committee, and, failing so to do, to notify the Convention and await its instructions.

The Committee adopted further procedures preliminary to reporting to the Convention proposals on third consideration. For example, proposals referred to this Committee were distributed for preliminary analysis and comment to the Co-Directors of the Convention's Research Staff, the Director of the Convention Drafting Bureau, this Committee's counsel, and an eminent outside consultant, Frank P. Grad, Director of State Constitutional Drafting Studies at Columbia University. The Committee's counsel then prepared revisions of the proposals referred to the Committee from the floor after second consideration as necessary to accomplish the function of the Committee. The end goal has always been the same: to critically consider each proposal referred to the Committee to insure that the report finally submitted by it to this Convention was clear, concise, unambiguous, and harmonious in style and manner of expression within the substantive committee's proposal as amended on second consideration, with other pending substantive proposals, and with the remainder of the Constitution of 1874.

Preliminary to discussing with you the Committee's report, we wish further to note that this Committee, at the specific request of the President of the Convention,

delayed rendering reports of Style and Drafting to permit the Convention to complete second consideration of the various proposals then before it. We also wish to acknowledge the efforts of counsel to the substantive Committee on Legislative Apportionment who worked diligently with this Committee's counsel on multiple revisions and drafts in an effort to present a polished and articulate proposal on legislative reapportionment. Of necessity, the arbiter in making a final judgment with respect to the Committee's report and recommendations was the Committee.

The Report of the Committee on Style and Drafting consists of four parts: (a) the complete, edited text of the substantive Committee's Proposal in "clean" copy; (b) a new print of the substantive Committee's Proposal, as approved by the Convention on second consideration, with the drafting changes effected by this Committee shown in the usual legislative form; (c) a resume of this Committee's recommendations for Convention action on significant unresolved matters of substance; and (d) the full text of the Committee's narrative in explanation of its action. We understand that you will receive on the next Convention day the new print of Committee Proposals Nos. 1 and 2 and, at the same time, a zerox copy of the Committee's narrative and the full text of the sections on legislative reapportionment in "clean" copy.

For your convenience, the Committee on Style and Drafting has arranged this narrative in two sections. The first reports on the Committee's concern with respect to, and recommendations on, unresolved matters of substance pursuant to Rule 22; the second comments upon the significant changes in drafting effected by the Committee.

II. SUBSTANTIVE RECOMMENDATIONS

A. Numbering districts. The Committee on Legislative Apportionment considered and rejected the issue of numbering senatorial and representative districts. We call the Convention's attention to the fact that all legislative

districts were once numbered in a normal and logical pattern. At present, as a map of senatorial districts will disclose, this mathematical and geographic pattern is not followed. The arbitrary numbering of legislative districts may permit a sophisticated type of gerrymandering.

The Committee believes this omission is a substantive matter of significance which should be resolved and respectfully suggests the following language for the Convention's consideration:

> SENATORIAL DISTRICTS SHALL BE NUMBERED IN SEQUENCES COMMENCING AT ONE GEOGRAPHICAL POINT IN THE COMMONWEALTH. REPRESENTATIVE DISTRICTS SHALL BE NUMBERED IN SEQUENCE COMMENCING AT ONE GEOGRAPHICAL POINT IN THE COMMONWEALTH.

B. Continuation of incumbents. The Committee has been advised by representatives of the substantive Committee on Legislative Apportionment that it intended, upon reapportionment pursuant to action by the Legislative Reapportionment Commission, all Senators to stand for reelection. The Committee notes that this creates the possibility that some Senators would be faced with the prospect of standing for election three times within a six year period. The Committee appreciates that changes in the terms of Senators are outside the call of the Convention. See Act No. 2 of 1967, Section 7, and Counsel Opinions 22 and 23.

The Committee observes, however, that the failure of the substantive committee to consider alternative procedures causes, by omission, the same result, i.e. the terms of half of the Senators are effectively reduced to two years in violation of the present Constitution, Article II, Section 3. The Committee regards this as an unresolved matter of substance and respectfully suggests the following language for the Convention's consideration:

TO THE EXTENT POSSIBLE, ANY REAPPORTIONMENT PLAN SHALL PROVIDE FOR THE CONTINUATION IN OFFICE OF ANY SENATOR WHOSE TERM WOULD NOT OTHERWISE EXPIRE IN THE YEAR OF THE GENERAL ELECTION NEXT FOLLOWING THE REAPPORTIONMENT TO REPRESENT A SENATORIAL DISTRICT SUBSTANTIALLY THE SAME AS THAT FROM WHICH HE WAS ELECTED.

C. Effective date. Section 17 provides that a reapportionment plan becomes final in one of three ways. As the substantive committee rightly notes, the time schedule set forth in Section 17 is designed to accomplish the reapportionment, including all judicial proceedings as necessary prior to the primary elections in the first even numbered year after the Federal decennial census has been officially reported.

The Committee believes that one further contingency ought to be considered. A possibility, however, remote, exists that the final reapportionment plan would not be available—whether a result of delays in the reporting of the census or, more likely, because all remedies available to aggrieved persons under Section 17 have not been exhausted until after the primary election but prior to the general election. The significant problem would then be: Is a special primary election held in the new districts? Or does the nominee from an old district run in the new district? The Committee, therefore, respectfully suggests the following language for the Convention's consideration:

(c) WHEN THE SUPREME COURT HAS FINALLY DECIDED AN APPEAL OR WHEN THE LAST DAY FOR TAKING AN APPEAL HAS PASSED WITH NO APPEAL TAKEN, THE REAPPORTIONMENT PLAN SHALL HAVE THE FORCE OF LAW AND THE DISTRICTS THEREIN PROVIDED SHALL BE USED IN THE NEXT PRIMARY ELECTION

IN AN EVEN-NUMBERED YEAR OCCURRING SIXTY (60) DAYS OR MORE AFTER SUCH EFFECTIVE DATE, AND IN THE ELECTIONS TO THE GENERAL ASSEMBLY THEREAFTER UNTIL THE NEXT REAPPORTIONMENT AS REQUIRED UNDER THIS SECTION 17.

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the First Amendment to the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Article I, §§ 2, 5, 20, Article II, §§ 2, 3, 16, 17, of the Constitution of the Commonwealth of Pennsylvania, and 42 U.S.C. § 1973, known as the Voting Rights Act of 1965. These provisions are as follows:

CONSTITUTION OF THE UNITED STATES

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA

ARTICLE I.

§ 2. Political Powers

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

§ 5. Elections

Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

§ 20. Right of petition

The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes by petition, address or remonstrance.

ARTICLE II.

§ 2. Election of members; vacancies

Members of the General Assembly shall be chosen at the general election every second year. Their term of service shall begin on the first day of December next after their election. Whenever a vacancy shall occur in either House, the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term.

§ 3. Terms of members

Senators shall be elected for the term of four years and Representatives for the terms of two years.

§ 16. Legislative districts

The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or a representative district.

§ 17. Legislative Reapportionment Commission

(a) In each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth. The commission shall act by a majority of its entire membership.

(b) The commission shall consist of five members: four of whom shall be the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a chairman selected as hereinafter provided. No later than 60 days following the official reporting of the Federal decennial census as required by Federal law, the four members shall be certified by the President Pro Tempore of the Senate and the Speaker of the House of Representatives to the elections officer of the Commonwealth who under law shall have supervision over elections.

The four members within 45 days after their certification shall select the fifth member, who shall serve as chairman of the commission, and shall immediately certify his name to such elections officer. The chairman shall be a citizen of the Commonwealth other than a local, State or Federal official holding an office to which compensation is attached.

If the four members fail to select the fifth member within the time prescribed, a majority of the entire

membership of the Supreme Court within thirty days thereafter shall appoint the chairman as aforesaid and certify his appointment to such elections officer.

Any vacancy in the commission shall be filled within fifteen days in the same manner in which such position was originally filled.

(c) No later than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer.

The commission shall have thirty days after filing the preliminary plan to make corrections in the plan.

Any person aggrieved by the preliminary plan shall have the same thirty-day period to file exceptions with the commission in which case the commission shall have thirty days after the date the exceptions were filed to prepare and file with such elections officer a revised reapportionment plan. If no exceptions are filed within thirty days, or if filed and acted upon, the commission's plan shall be final and have the force of law.

(d) Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within thirty days after the filing thereof. If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order.

(e) When the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan shall have the force of law and the districts therein provided shall be used thereafter in elections to the General

Assembly until the next reapportionment as required under this section 17.

(f) The General Assembly shall appropriate sufficient funds for compensation and expenses of members and staff appointed by the commission, and other necessary expenses. The members of the commission shall be entitled to such compensation for their services as the General Assembly from time to time shall determine, but no part thereof shall be paid until a preliminary plan is filed. If a preliminary plan is filed but the commission fails to file a revised or final plan within the time prescribed, the commission members shall forfeit all right to compensation not paid.

(g) If a preliminary, revised or final reapportionment plan is not filed by the commission within the time prescribed by this section, unless the time be extended by the Supreme Court for cause shown, the Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth.

(h) Any reapportionment plan filed by the commission, or ordered or prepared by the Supreme Court upon the failure of the commission to act, shall be published by the elections officer once in at least one newspaper of general circulation in each senatorial and representative district. The publication shall contain a map of the Commonwealth showing the complete reapportionment of the General Assembly by districts, and a map showing the reapportionment districts in the area normally served by the newspaper in which the publication is made. The publication shall also state the population of the senatorial and representative districts having the smallest and largest population and the percentage variation of such districts from the average population for senatorial and representative districts.

STATUTES

42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.